Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

HON. SHARRON E. ANGLE, *et al.* MEMBERS OF THE NEVADA STATE ASSEMBLY AND NEVADA STATE SENATE,*

Petitioners,

v.

KENNY GUINN, Governor of the State of Nevada, *et al.*,*

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the effective nullification of a key, recently-enacted structural provision of the Nevada State Constitution violates the Republican Guarantee Clause of Article IV of the United States Constitution?

2. Whether *federal* due process imposes *any* limits on a state court's ability to "interpret" its own state constitution and, if so, whether due process is violated by the Nevada State Supreme Court decision granting a remedy that no party had requested, which effectively nullified a structural provision of the State's Constitution and violated several well-established canons of constitutional construction?

3. Whether deeming a bill raising taxes as "passed" by simple majority vote rather than the 2/3 vote required by an amendment to the Nevada Constitution dilutes the votes of legislators and their constituents and nullifies the votes of those who supported the state constitutional amendment, in violation of the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioners: Hon. Sharron E. Angle, Hon. Walter Andonov, Hon. Bob Beers, Hon. David F. Brown, Hon. John C. Carpenter, Hon. Chad Christensen, Hon. Peter J. Goicoechea, Hon. Thomas J. Grady, Hon. Donald G. Gustavson, Hon. Lynn C. Hettrick, Hon. Ronald L. Knecht, Hon. R. Garn Mabey, Jr., Hon. John W. Marvel, Hon. Roderick R. Sherer, Hon. Valerie E. Weber, Members of the Nevada State Assembly; Hon. Mark E. Amodei, Hon. Barbara K. Cegavske, Hon. Warren B. Hardy II, Hon. Mike McGinness, Hon. Dennis Nolan, Hon. Ann O'Connell, Hon. Dean A. Rhoads, Hon. Sandra J. Tiffany, and Hon. Maurice E. Washington, Members of the Nevada State Senate

Respondents: Hon. Kenny Guinn, Governor of the State of Nevada; The Legislature of the State of Nevada; Hon. Richard D. Perkins, Speaker of the Nevada Assembly; Hon. Bernie Anderson, Hon. Morse Arberry, Jr., Hon. Kelvin D. Atkinson, Hon. Barbara E. Buckley, Hon. Vonne S. Chowning, Hon. Jerry D. Claborn, Hon. Tom Collins, Hon. Marcus Conklin, Hon. Jason Geddes, Hon. Dawn Gibbons, Hon. Chris Giunchigliani, Hon. David Goldwater, Hon. Josh Griffin, Hon. Joe Hardy, Hon. William C. Horne, Hon. Ellen M. Koivisto, Hon. Sheila Leslie, Hon. Mark A. Manendo, Hon. Kathy McClain, Hon. Bob McCleary, Hon. Harry Mortenson, Hon. John Oceguera, Hon. Genie Ohrenschall, Hon. David R. Parks, Hon. Peggy Price, Hon. Wendell P. Williams, Members of the Nevada State Assembly; Hon. Lorraine T. Hunt, President of the Senate; Hon. Terry Care, Hon. Maggie Carlton, Hon. Bob Coffin, Hon. Bernice Mathews, Hon. Joseph M. Neal, Jr., Hon. William J. Raggio, Hon. Raymond D. Rawson, Hon. Michael Schneider, Hon. Raymond C. Shaffer, Hon. Dina Titus, Hon. Randolph Townsend, Hon. Valerie Wiener, Members of the Nevada State Senate.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Less then eight years ago, the voters of Nevada overwhelming amended their state Constitution to restrict their Legislature from raising taxes without a 2/3 vote in each house. This past July, in response to an extraordinary suit brought by the Governor of Nevada against the Legislature, the Nevada Supreme Court issued an even more extraordinary order, directing the Legislature to ignore that constitutional provision, not because it violated any federal constitutional right, but simply because it had proved an impediment to the Legislature's ability to adopt appropriations larger than the existing revenue streams would support. The court reached its conclusion by what can only be described as a complete and willful disregard for the language and structure of the Constitution and for virtually every single cannon of

constitutional construction heretofore guiding Nevada judicial functions. The decision stands as an unvarnished usurpation of the authority of the Nevada Constitution, a shameful violation of the judicial oath, and a repudiation of the principle that Nevada's is a government of laws rather than men.

This Court in *New York v. United States* recognized that attempts by state governmental officials to alter "the form or the method of functioning" of the state government might well give rise to a justiciable Republican Guarantee Clause challenge. 505 U.S. 144, 186 (1992). This case presents such a viable challenge if ever a case did. Particularly when considered together with the significant vote dilution, vote nullification, and due process claims that Petitioners raised below, claims which, like the Republican Guarantee Clause claim itself, go to the very essence of republican self-government, a writ of certiorari is warranted to review (and reverse) the egregious disregard of the people's will manifested in the opinion of the Nevada Supreme Court below.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada, dated July 10, 2003, is reported at 71 P.3d 1269 (Nev. 2003) and is reproduced at pages 1a-22a of the appendix to this petition ("Pet. App."). That Court's order denying Petitioners' motion for rehearing, dated September 17, 2003, is reported at 76 P.3d 22 (Nev. 2003) and is reproduced at Pet. App. 23a-50a. There are no opinions from the Nevada trial or intermediate appellate courts, as Respondent Governor Guinn brought his petition for a writ of mandamus against the Nevada Legislature directly to the Nevada Supreme Court under that court's original jurisdiction.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Nevada ordering the Legislature of Nevada to consider tax increases "under

simple majority rule" rather than the 2/3 vote required by the Nevada Constitution was entered on July 10, 2003. The court denied a petition for rehearing on September 17, 2003—Constitution Day. A timely request for extension, filed on December 4, 2003, was granted by Justice O'Connor on December 8, 2003, extending the time in which to file this petition until January 17, 2004, and thus to January 20, 2004 by operation of Rule 30.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL PROVISIONS

The Republican Guarantee Clause of Article IV, § 4 of the United States Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . .

The Equal Protection Clause of the Fourteenth Amendment provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article 4, § 18 of the Nevada Constitution, adopted by voter initiative in 1996, provides, in relevant part:

> 2. Except as otherwise provided in subsection 3, an affirmative vote of not fewer than two-thirds of the members elected to each house is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.

> 3. A majority of all of the members elected to each house may refer any measure which creates, generates, or increases any revenue in any form to the people of the State at the next general election, and shall become effective and enforced only if it has been approved by a majority of the votes cast on the measure at such election.

Article 9, § 2(1) of the Nevada Constitution provides:

> The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year exceed the income, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.

Article 11, § 2 of the Nevada Constitution, adopted in 1864, provides:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, ...

Article 11, § 6 of the Nevada Constitution provides:

> In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

STATEMENT OF THE CASE

In 1994 and again in 1996,[1] Nevada voters overwhelmingly approved an amendment to their state Constitution, which prohibited the state Legislature from imposing new or increased taxes without the concurrence of 2/3 of the Members of each house of the Legislature. Nev. Const. Art. 4 § 18(2). Tax measures that do not receive the necessary 2/3 vote may still be adopted, but must be submitted to the voters for approval before they can take effect. *Id.* § 18(3).

At the outset of the 2003 legislative session, Nevada Governor Kenny Guinn, the lead Respondent here, proposed to the Legislature a budget which included a $980 million tax increase, Pet. App. 7a, 32a, by far the most massive tax increase in the State's history. Unable to garner the 2/3 vote required to approve the Governor's requested tax hike, the Legislature adjourned its session on June 3, 2003, having approved appropriations totaling more than $3.2 billion—without a dime for education, arguably the only spending item actually mandated by the Nevada Constitution. Pet. App. 7a, 32a. Governor Guinn then immediately called the Legislature into special session to consider a tax increase and a couple of education funding bills.

Because the Nevada Constitution mandates a balanced budget, and because the previously-approved spending bills had left only $700 million to cover a proposed education budget of $1.6 billion, any appropriation for education approved during the special session by the Legislature that was anywhere near the amounts proposed was going to require a

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[1] Nev. Const. Art. 19, § 2(4) provides that a constitutional amendment requires the approval of a majority of the voters at two general elections. The 2/3 vote tax initiative at issue here, also known as the "Gibbons Tax Restraint Initiative" after its chief sponsor, Jim Gibbons (now a member of the U.S. House of Representatives from Nevada's 2nd District), was supported by more than 70% of the voters in each of the two elections.

tax increase of somewhere between $800 and $900 million. The Legislature could not consider reductions elsewhere in the budget because the Governor's special session proclamation did not give the Legislature such authority, and the Governor ignored requests to expand the special session to allow consideration of spending cuts or even reductions in the rate of spending increases already approved. *See* Nev. Const. Art. 5, § 9 ("the Legislature shall transact no legislative business [in a special session convened by the Governor], except that for which they were specially convened"); Pet. App. 34a. The Nevada Assembly was unable to muster a 2/3 vote for any of the tax increases that reached the Assembly floor, either during the 19th Special Session or the 20th, convened by the Governor on June 25, 2003, although it was widely believed that a smaller tax increase would receive the necessary 2/3 vote. *See* Pet. App. 36a ("The issue, according to these legislators, was not whether there would be a tax increase, but the necessity of a particular amount. Each scenario envisioned a several hundred million dollar tax increase").

Minutes after midnight on July 1, 2003, the first day of the new fiscal year for the Nevada state government, Governor Guinn brought suit against the Nevada Legislature and every one of its Members. He petitioned the Supreme Court of Nevada for a writ of mandamus, seeking to compel the Legislature to take legislative action on his tax increase and thereby balance the budget and fund education by the means he had proposed but for which he had been unable to obtain the constitutionally-required level of support.

A group of legislators—Petitioners here—field a counter-petition, seeking an order directing the Governor to expand the special session so that the Legislature could also consider reductions in the spending increases already approved. Pet. App. 36a. Roughly fifty different organizations and individuals filed nearly a dozen *amicus curiae* briefs either in support of or opposition to the Governor's petition.

On July 10, 2003, the Nevada Supreme Court issued a truly extraordinary Opinion and Writ of Mandamus directing the Nevada Legislature to consider tax-increase legislation by "simple majority rule" rather than the 2/3 vote required by Article 4, § 18(2) of the Nevada Constitution, Pet. App. 6a, 14a, unexpectedly granting a remedy that had not been requested by Governor Guinn or by any of the parties in the litigation, Pet. App. 15a (Maupin, J., dissenting). Although the court acknowledged the constitutional validity of the 2/3 vote provision of Article 4, § 18(2), it found, without evidentiary hearing, that the provision was preventing the Legislature from raising the taxes the court thought necessary to meet the education funding provisions of Article 11. And although the 2/3 vote provision was much more recent than the century-old education provisions, the court found the structural limitation imposed by Nevada voters on its Legislature to be a mere "procedural and general constitutional requirement" that had to "give way to the substantive and specific constitutional mandate to fund public education." Pet. App. 6a.

Three days later, on Sunday, July 13, the Nevada Assembly conducted a floor vote on Senate Bill 6 ("SB6"), a bill that sought to increase taxes in the State by $788 million. Although the bill failed to garner the 2/3 vote required by Article 4, § 18(2), the Speaker of the Assembly gaveled the bill "passed." The next morning, the legislative Petitioners here, joined by individual citizens, taxpayers, trade groups and tax policy organizations, filed suit in the United States District Court for the District of Nevada, contending that the Assembly's action amounted to vote dilution and vote nullification in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and ignored the structural commands of the state Constitution in violation of the Republican Guarantee Clause of Article IV, § 4 of the United States Constitution. Although the district court, sitting *en banc*, granted plaintiffs request for a temporary re-

straining order that same day, by week's end it held that it was without jurisdiction to consider the legislators' claims under the *Rooker-Feldman* doctrine and dismissed the action. *Angle v. Legislature of State of Nevada*, 274 F.Supp. 2d 1152, 1155 (D. Nev. July 18, 2003). The district court suggested that the *Rooker-Feldman* doctrine also barred the claims of the non-legislators, but dismissed those claims under Rule 12(b)(6), without prejudice to re-filing in state or federal court. *Id.*, at 1156.[2]

Late in the evening of the next day, a Saturday, with the TRO lifted, the Nevada Assembly proceeded to consider another bill raising taxes, Senate Bill 5 ("SB5"). SB5 also failed to garner a 2/3 vote, but the Assembly Speaker nevertheless deemed the bill "passed," this time over a point of order objection that, in violation of parliamentary procedure, he refused to submit to a requested roll-call vote of the body.

The following Monday, July 21, 2003, the group of Legislators—again, Petitioners here—filed a Petition for Rehearing with the Nevada Supreme Court requesting that the court reconsider its ruling and recall its writ of mandamus. Pet. App. 51a-74a. Petitioners specifically raised the federal vote dilution, vote nullification, due process and Republican Guarantee Clause claims that are the subject of this petition for a writ of certiorari. Pet. App. 66a-73a. The group of Legislators also filed an application for an emergency stay, which the court set over for additional briefing and did not decide until summarily denying it on September 17, 2003. The citizens and taxpayers who had joined them in the federal action filed a motion to intervene on July 21, 2003, seeking to present their federal claims to the Nevada Supreme Court as well. That motion was denied less than an hour

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[2] The federal action is currently pending before the Ninth Circuit Court of Appeals, focusing on the *Rooker-Feldman* jurisdictional issue.

later, in an order hurriedly signed by only four of the court's seven Justices.

Late that evening, by its own account because of the changed dynamic in the Legislature produced by the Nevada Supreme Court's writ of mandamus, the Nevada Legislature adopted tax legislation by a two-thirds supermajority, in conformity with the Nevada Constitution. Pet. App. 27a-28a. Although Petitioners then filed a motion to vacate the Nevada Court's original decision on the Nevada equivalent of *Munsingwear* grounds, *see United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *City of Las Vegas v. Sunward Sales, Inc.*, 843 P.2d 1207, 1208 (1982), the Nevada Supreme Court refused. It denied the petition for rehearing as moot and also summarily denied the motion to vacate on September 17, 2003. Pet. App. 45a, 47a n.46. Justice Maupin, dissenting, would have granted the petition for rehearing, dissolved the mandamus, and vacated the prior majority opinion.

REASONS FOR GRANTING THE WRIT

Briefly stated, this Court's review is warranted because, as described in Part I below, the extraordinary writ issued by the Nevada Supreme Court violated the Republican Guarantee Clause of Article IV of the United States Constitution, and diluted the votes of Legislators and their constituents, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Although Petitioners first raised those claims in their petition for rehearing before the Nevada Supreme Court, this Court has jurisdiction where, as here, the federal issues arose as the result of an unexpected decision by a state's highest court and petitioners therefore had no prior opportunity to raise the federal claims. *See Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930). The Nevada Supreme Court's refusal even to address, much less put to rest, Petitioners' significant federal claims, in the context of its extraordinary or-

der for the state Legislature to ignore a key structural provision of the state Constitution, presents important questions of federal constitutional law that have not been, but should be, addressed by this Court.

Relying on the Nevada Supreme Court's extraordinary decision, the Nevada Assembly twice deemed as "passed" tax increases that failed to receive the 2/3 vote required by the Nevada Constitution. As will be discussed at greater length in Part II, *infra*, the fact that the Legislature ultimately achieved a 2/3 majority on another tax bill does not render this case moot. First, the Nevada Supreme Court's decision remains on the books, where it will continue to affect the dynamic in the Legislature, "authorize" unconstitutional vote dilution, and undermine the structural limits imposed by the people of Nevada. Second, the Nevada Assembly already took unconstitutional action in reliance on the decision below, violating federal constitutional rights of Petitioners and their constituents. Third, voluntary cessation of unlawful conduct does not moot a case where the actor remains free, as here, to begin the unlawful conduct anew. Moreover, even if legislative approval of a tax increase somehow mooted Petitioners' challenge to the ongoing effects of the Nevada Supreme Court decision authorizing such conduct, the unlawful vote dilution is certainly capable of repetition yet evading review. Finally, had the case truly become moot in the midst of petitioners' effort to have the Nevada Supreme Court address the significant violations of federal constitutional rights caused by its decision, the proper course for the Nevada Supreme Court would have been to vacate its decision. That it chose not to confirms not only the lingering effect of the decision, but also the court's intent to have such an effect.

I. The Nevada Supreme Court's Order, and Subsequent Action by the Assembly in Reliance on It, Violated Fundamental Federal Constitutional Rights that Require this Court's Protection.

Most fundamentally, the writ of mandamus issued by the Nevada Supreme Court directing the Legislature to ignore a key structural provision of the Nevada Constitution altered the way the Nevada Legislature has been authorized by the people of Nevada to do business, in violation of the federal constitutional guarantee that the people may choose the particulars of their republican form of government. Moreover, the manner in which the court reached its decision, granting a remedy never requested by any party and ignoring or misapplying its own well-established canons of construction, raises serious due process concerns.

The specific actions taken under the supposed "authority" of the decision below resulted in the unconstitutional dilution of Petitioners' votes when, on July 13, 2003 and again on July 19, 2003, the Nevada Assembly deemed as "passed" a bill increasing taxes without the 2/3 vote required by the Nevada Constitution. Derivatively, the actions by the Assembly, again under the "authority" of the decision below, diluted the representation to which the constituents of Petitioners were entitled by the clear command of the Nevada Constitution and effectively nullified the votes of the hundreds of thousands of Nevada citizens who in 1994 and 1996 overwhelming approved the 2/3 vote provision as an amendment to their state Constitution. These actions violate voting rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Because of the strength and significance of these claims, which were never addressed by the Nevada Supreme Court below (nor by the district court in the parallel federal action, which held it was jurisdictionally barred), this Court's review is now warranted.

A. Republican Guarantee Clause Claim

Article IV, section 4 of the U.S. Constitution provides that "The United States shall guarantee to every State in the Union a Republican Form of Government." Although claims premised on the Republican Guarantee Clause have long been viewed as nonjusticiable political questions in most circumstances, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849), Justice O'Connor noted in *New York v. United States* "that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." 505 U.S. 144, 183 (1992). "Contemporary commentators," she noted, "have likewise suggested that courts should address the merits of such claims, at least in some circumstances. *Id.* at 185 (citing *L. Tribe, American Constitutional Law* 398 (2d ed. 1988); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 118, and n., 122-123 (1980); W. Wiecek, *The Guarantee Clause of the U.S. Constitution* 287-289, 300 (1972); D. Merritt, 88 Colum. L. Rev. 1, 70-78 (Jan. 1988); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 560-565 (1962)).

In the wake of this Court's decision in *New York*, several lower courts have acknowledged that the Republican Guarantee Clause might present justiciable questions, but thus far all have found that the Clause had not been violated in the particular circumstances at issue in the cases. *See Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Adams v. Clinton*, 90 F.Supp.2d 35 (D.D.C. 2000); *New Jersey v. United States*, 91 F.3d 463, 468-69 (3rd Cir. 1996); *Padavan v. United States*, 82 F.3d 23, 27-28 (2nd Cir. 1996); *Deer Park Ind. Sch. Dist. v. Harris Cty. Appraisal Dist.*, 132 F.3d 1095, 1099-1100 (5th Cir. 1998); *City of New York v. United States*, 179 F.3d 29 (2nd Cir. 1999); *Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995). Others, in conflict, have held that Republican Guarantee Clause claims remain

nonjusticiable. *See State ex. rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Or. 1997).

This case presents one of the rare instances in which a Republican Guarantee claim must be viable. The essence of the republican guarantee is the right of a State's citizens to "structure their government as they see fit." *Kelley*, 69 F.3d, at 1511. In *New York* itself, this Court dismissed the Guarantee Clause claim only because the statute in that case did not "pose any realistic risk of altering the form or the method of functioning of New York's government." 505 U.S., at 186. But here, the decision below has already altered "the method" by which the Legislature functions when undertaking to impose new or increased taxes. Such claims should be viable under *New York*, and have specifically been recognized as viable in the Third and Fifth Circuits. *See Texas*, 106 F. 3d, at 667; *New Jersey*, 91 F.3d, at 468-69; *cf. Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 169 F.3d 820, 895 (4th Cir. 1999) (noting that the federal courts are supposed to protect the structural preferences of a State's citizens, serving as a sort of "structural referee"), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000).

The receptiveness of these courts to Republican Guarantee Clause claims for structural constitutional violations stands in stark contrast to the treatment afforded the claim by the Nevada Supreme Court below. Indeed, the Nevada Court's order was such an extraordinary departure from the judicial office, that one can hardly imagine a more apt case for pressing a Republican Guarantee Clause claim than this.

"We must accept the duly enacted constitution and laws of this state, whether they are well or ill advised ...." That statement, which captures the essence of the federal guarantee that the people may choose the particulars of the republican form of government under which they wish to live, was surprisingly made not by Justice Maupin in dissent but by Justice Shearing in her opinion concurring in the denial of

the petition for rehearing below. Had Justice Shearing and her colleagues paid heed to her own admonition, the State of Nevada would not be in the midst of the constitutional crisis that it is.

Instead, the majority of the Nevada Supreme Court, the Governor of the State, and a majority of the State's Legislature refused to accept the clear, unambiguous and perfectly constitutional command of the Nevada Constitution that had twice been approved by the overwhelming majority of Nevada voters.

This was no mere state court interpretation of ambiguous state law, which as a general rule is beyond the supervisory authority of this Court. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000). No; the Nevada Supreme Court candidly admitted that the 2/3 vote provision was unambiguous, that it was validly enacted, and that it did not violate any command of the federal Constitution. *See, e.g.*, Pet. App. 8a, 10a, 12a. The court's ensuing cavalier treatment of a binding state constitutional amendment, however, undermines government by consent, which is the essence of the guarantee of republican government.

B. Due Process Violations

Not surprisingly, a decision such as the Nevada Supreme Court's below that undermines the very notion of constitutional government also violates the commands of federal due process, particularly where, as here, the Court ordered a remedy that had not been requested by any party. State courts simply do not have a free hand to interpret state law beyond what a "fair reading" would permit, without violating due process. *Bouie v. City of Columbia, South Carolina*, 378 U.S. 347, 361-62 (1964); *Bush v. Gore*, 531 U.S. 98, 115 (2000). The Nevada Supreme Court's decision is thus susceptible to—and, given the seriousness of the threat to constitutionalism, warrants—this Court's review.

1. The Remedy Afforded by the Nevada Supreme Court Had Not Been Requested, or Even Suggested, by Any Party.

One of the most curious aspects of the Nevada Supreme Court's decision was that no party ever asked the court to invalidate Art. 4 § 18(2) or even to suspend its operation in this session.[11] Justice Maupin, in dissent, expressly noted without contradiction that "none of the parties directly named in this litigation, including the Governor, have requested the specific relief we provide today." Pet. App. 15a. The Governor, too, admitted during the parallel proceedings in the federal District Court that he "never requested that the two-thirds legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken." *Angle*, Governor's Opp. Br., at 6. The remedy was raised for the first time by the Nevada Court's decision, without argument or hearing, contrary to the most basic precepts of due process. *See Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) (holding that parties need "to know the issues on which decision will turn and to be apprised of the factual material" so that they may rebut claims against them) (citing *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937); *United States v. Abilene*, 265 U.S. 274 (1924)).

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[11] Although an *amicus* brief of the NEA questioned whether this state constitutional provision violated the federal Constitution, the court did not decide the case based on the federal constitutional issues presented by those *amici*. To do so, moreover, would have been procedurally improper, for a number of reasons. Even assuming NEA had been granted leave to file its brief, *amici* cannot raise new issues on their own. The parties were not called on to brief the *amici*'s points. Although the Court ordered the Governor and other counter-respondents to respond to the counter-petition filed the same day as the *amicus* brief, no response was ordered to any issues raised by the *amici*.

2. "Unconstitutional" constitutional amendments

The Nevada Court gave life to the old law-school hypothetical notion of "unconstitutional constitutional amendmens." The notion posits that there are some provisions of a constitution so fundamental, so central to basic principles of political theory, that they simply cannot be amended. *See, e.g.*, Walter F. Murphy, THE NATURE OF THE AMERICAN CONSTITUTION (1989); Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 380 (1995). Even if it would *ever* be appropriate for a court to invalidate a constitutional amendment on such grounds, this is not the case. Unlike the examples typically used in the hypothetical context—separation of powers restrictions, for example, or supermajority requirements for the adoption of amendments—the Nevada Supreme Court here *rejected*, rather than protected, a structural provision in favor of a non-structural one.

3. Canons of Construction

As expressly noted by Petitioners in their petition for rehearing below, Pet. App. 64a, the Nevada Supreme Court also ignored or misapplied a number of longstanding interpretative canons in the course of rendering its extraordinary and unexpected decision, including:

- More recently enacted constitutional provisions prevail over older provisions;
- Specific provisions will prevail over generalized provisions on the same subject matter;
- A court is, to the maximum extent possible, supposed to reconcile apparently conflicting provisions;
- A court must give effect to unambiguous provisions;
- A court sitting in equity will not render equity to a party coming with "unclean hands."

The Nevada Court's utter refusal to follow or consistently apply any one of those traditional canons of interpretation would raise serious due process concerns, but its failure faithfully to apply any of them in this particular case surely must warrant this Court's consideration.

Last In Time Prevails. Nevada has long subscribed to the interpretative canon that "if there is an irreconcilable conflict between two statutes, the statute which was most recently enacted controls the provisions of the earlier enactment." *Marschall v. City of Carson*, 464 P.2d 494, 500 (Nev. 1970) (citing, e.g., *State ex rel. Eggers v. Esser*, 129 P. 557 (Nev. 1913)).

Nevada applies the same rules of construction when construing constitutional provisions that it applies when construing statutes. *Nevada Mining Ass'n v. Erdoes*, 26 P.3d 753, 757 (2001). Indeed, in the context of constitutional provisions, the "last in time" principle is more than just an interpretive canon; it is compelled by the very nature of constitutional government and the recognition in the Declaration of Independence that governments are established by the consent of the governed. Decl. of Ind. ¶ 2; *see also* Nevada Enabling Act, 13 Stat. 30 (1864) (requiring conformity with the principles of the Declaration). As a result, the Nevada Supreme Court has given the principle particularly strong application in the context of constitutional provisions:

> [I]t is an oxymoron to state that a duly-ratified constitutional amendment can, at the time of its passage, violate that same constitution. It is one of the best-established principles of constitutional interpretation that in the case of a clear conflict between a constitutional amendment and another constitutional provision already existing at the time the amendment is ratified, the amendment, being the later expression of will of the lawmaker, must prevail.

Whitehead v. Nevada Commission on Judicial Discipline, 878 P.2d 913, 938 (Nev. 1994) (citing *Schick v. United States*, 195 U.S. 65, 68-69 (1904)).

That "oxymoronic" proposition is precisely the holding of the Nevada Supreme Court below. Although the Court did not go so far as to actually declare the 2/3 vote provision *unconstitutional*, as some of the *amici* had urged, Pet. App. 40a, it did deprive the provision of any effect, which is even worse, for it effectively negated a duly-enacted act of the people without even the pretense of a holding of unconstitutionality: "Our opinion did not eliminate the two-thirds requirement, but it did indicate that the supermajority provision could not be used to avoid other constitutional duties." Pet. App. 45a.

Specific provisions prevail over general. The Nevada Supreme Court sought to avoid the clear import of the last-in-time rule by manufacturing a new rule of interpretation that "substantive" provisions trump "procedural" provisions of the Constitution. Although it attempted to portray that new rule as of a piece with the longstanding rule that general provisions must yield to specific provisions, Pet. App. 11a, the court's new dichotomy was actually a bastardization of the older rule, treating a core structural provision of the State's Constitution as a mere "procedural" rule and treating as "specific" the very general provision that "the legislature shall provide for [the] support and maintenance [of at least one common school in each district] by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law." Pet. App. 12a; Nev. Const. Art. 11, §§ 2, 6. Indeed, had it looked to the "specific" requirements of the education provisions, it would have been immediately apparent that the only obligation is to fund a limited number of schools for half a year; a requirement that could easily have been met with the approximately $700 million already available in the budget without need for

further appropriations and without conflict with the exceptionally specific requirement that new taxes be approved by a 2/3 vote.

Under the court's new reasoning, other "procedural" provisions of the Nevada Constitution are just as susceptible to judicial nullification as was the 2/3 vote provision, including the requirement of bicameralism, presentment, the 120-day restriction on legislative sessions, and even the limitation on matters that can be considered in special session. *See* Nev. Const. Art. 4, §§ 2, 18(1), 35; Art. 5, § 9. The Nevada Supreme Court has already acknowledged that these provisions, too, contribute to the supposed conflict between the 2/3 tax provision, on the one hand, and the education funding and balanced budget provisions, on the other. Pet. App. 33a (noting that other problems contributing to the conflict included the "abbreviated nature of the legislative session" and "policy disagreements between the Senate and Assembly").

These provisions are every bit as "procedural" and "general," in the Nevada Supreme Court's newly manufactured hierarchy of constitutional commands, as was the 2/3 vote provision. The Senate had already voted to approved the tax increase by the requisite 2/3 vote, so the bill could have been deemed as "passed" by the Nevada Court without any Assembly input to avoid the "conflict" between the "general" bicameralism provision and the "specific" education funding provision. Indeed, the Court could just as easily have ordered the Legislature to ignore the requirement of Article 4, Section 19, which bars the State Treasurer from releasing funds without a legislative appropriation.

Such absurdities are no different than the court's nullifying the 2/3 requirement for new taxes, which represents, more than anything else, an abandonment of constitutional government and a court run amok.

Reconcile conflicting provisions. Another long-standing interpretive canon followed in Nevada is that, whenever pos-

sible, courts are to interpret rules or statutes in harmony with other rules and statutes. Pet. App. 11a (citing *Bowyer v. Taak*, 817 P.2d 1176, 1177 (1991)). Indeed, the Nevada Court has frequently noted that it is "obligated" to reconcile conflicting provisions to the maximum extent possible. *Id.*; *Weston v. Lincoln County*, 643 P.2d 1227, 1229 (Nev. 1982).

The Nevada Supreme Court here disregarded several obvious means of reconciling the supposed conflict between the 2/3 vote provision, on the one hand, and the balanced budget and education funding provisions, on the other. It refused Petitioners' request to remit the matter back the Governor, who possessed the power to expand his special session proclamation to permit the Legislature to consider spending reductions, which very likely would have solved the impasse. It broadly read the education provisions to mandate a level of funding that necessitated a tax increase beyond the level for which there was the support of 2/3 of the Legislature, when nothing in those clauses remotely suggests any specific level of funding. Indeed, the only requirement is found in Art. 11, § 2, which mandates only that the Legislature provide one school in each district for a minimum of six months each year—a mandate that was easily met without violating the 2/3 vote provision. Neither of these obvious ways of reconciling the supposed conflict was considered by the court,[3] which instead simply rendered nugatory the later-enacted 2/3 vote provision.

Unambiguous Provisions. Finally, the Nevada Court gave only lip service to a key restriction on the judicial role that it has in the past repeatedly applied:

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[3] A third alternative, resort to Article 4, section 18(3), which specifically provides that tax increases failing to garner a 2/3 vote could nevertheless take effect if approved by a simple majority of the voters, was completely discounted by the Court as "inadequate." Pet. App. 10a n.12.

> Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.

State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 995 P.2d 482, 485 (Nev. 2000).

Despite its own repeated treatment of the 2/3 vote provision as "clear on its face," the Nevada Supreme Court looked beyond the clear text to other materials to try and ascertain a different voter intent, concluding, essentially, that the voters were too ignorant to have understood what effect the initiative would actually have on the functioning of state government. Pet. App. 31a.

"Unclean Hands." The Nevada Supreme Court has long subscribed to "the well-established defense to equitable claims that litigants seeking equity must come with 'clean hands.'" *Tracy v. Capozzi*, 642 P.2d 591, 593 (Nev. 1982).

Here, the legislative standstill that led Governor Guinn to invoke the equity jurisdiction of the Nevada Supreme Court was at least in part of his own making, the result of his refusal to expand his special session proclamation to permit the Legislature to consider reductions in previously-approved appropriations. Petitioners' counter-petition, asking the Nevada Supreme Court not to consider the Governor's petition because of the Governor's unclean hands, was denied; the Court inexplicably asserted that it had "no authority, under the separation of powers doctrine, to compel either the Governor or the Legislature to employ such methods to resolve any impasse." Pet. App. 9a n. 9. Such faux concern for separation of powers presents particularly bitter irony given the court's ensuing disregard for Nevada's Constitution.

By such cavalier disregard of, and contempt for, unambiguous voter will, the Nevada Supreme Court substituted its

judgment for that of the voters. By itself, that undermines republican government. Joined with the other canons of construction disregarded by the court below, due process also was violated to such a degree as to warrant this Court's attention.

C. Legislator Vote Dilution Claims

This Court has expressly recognized that a state legislator has a federal cause of action to challenge actions by the state legislature that dilute or render nugatory the legislator's vote. *See Coleman v. Miller*, 307 U.S. 433, 438 (1939) (holding that state legislators "have a plain, direct, and adequate interest in maintaining the effectiveness of their votes"). At issue in *Coleman* was whether, in voting to ratify a federal constitutional amendment, the lieutenant governor of the State was permitted to cast a vote in the event of a tie. As the Court noted, "the twenty senators [who were petitioners in the case] were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution." *Id.*, at 441; *cf. Skaggs v. Carle*, 110 F.3d 831, 833 (D.C. Cir. 1997) (noting that "the harm worked by [a rule changing the amount of votes necessary to pass legislation]—diluting the Representatives' votes and diminishing their ability to advocate a position—is apparent, as is the command of the Constitution that we remedy that harm").

Although *Coleman* involved a federal constitutional amendment, several courts have recognized that a state legislature's failure to comply with its own procedures may violate federal Due Process. *See, e.g., Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997) (quoting *Atkins v. Parker*, 472 U.S. 115, 130 (1985)); *Conway* v. *Searles*, 954 F. Supp. 756, 767 (D. Vt. 1997). "Fairness (or due process) in legislation is satisfied when legislation is enacted in accordance with the procedures established in the state constitution and statutes

for the enactment of legislation," *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991), not by legislation enacted in violation of the procedures mandated by the state constitution, as here. "Legislative rules are judicially cognizable, and may therefore be enforced by the Courts." *Conway*, 954 F. Supp. at 769 (citing *Yellin v. United States*, 374 U.S. 109, 114 (1963); *Christoffel v. United States*, 338 U.S. 84 (1949)).

Moreover, this Court has expressly suggested, albeit in *dicta*, that members of state legislative bodies have standing to bring a vote dilution claim that arises from violations of *state law*. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986) ("if ... state law authorized School Board action solely by unanimous consent," a disenfranchised school board member "might claim that he was legally entitled to protect 'the effectiveness of [his] vot[e]'") (quoting *Coleman*, 307 U.S. at 438) (brackets in original). A legislator in such circumstances "would have to allege that his vote was diluted or rendered nugatory under state law," and "he would have a mandamus or like remedy against the Secretary of the School Board." *Id.*

The hypothetical case described in *Bender* is nearly identical to the case here. State law—Article 4, § 18(2) of the Nevada Constitution—authorizes legislative action on tax increases "solely" by 2/3 vote. The disenfranchised legislators—Petitioners here, who together provided enough votes to defeat the tax increase pursuant to the 2/3 vote requirement of Article 4—claimed in their petition for rehearing that their vote was diluted below the weight required by state law. Under the provisions of the Nevada Constitution, the vote of a Member of the State Assembly is 1/15 of the votes necessary to defeat a tax increase. Under the procedure "authorized" by the Nevada Supreme Court's decision below, an Assemblyman's vote was only 1/21 of the votes necessary to defeat a tax increase—a classic case of vote dilution, in vio-

lation of the Due Process Clause. This Court should grant certiorari in this case to consider what was only *dicta* in *Bender*, and to address the implicit split on this issue between the Nevada Supreme Court in this case, on the one hand, and the Fourth and Ninth Circuits and the District of Vermont, in *Richardson, Rea*, and *Conway*, respectively, on the other.

D. Constituent Representation Dilution Claims

This Court has repeatedly recognized vote dilution claims by voters. *See Westberry v. Sanders*, 376 U.S. 1 (1964); *Franklin v. Massachusetts*, 505 U.S. 788 (1992). "'[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Roe v. State of Ala. By and Through Evans*, 43 F.3d 574, 580 (11th Cir. 1995) (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)).

That the dilution occurs after the voters' representative is elected, and is therefore derivative of the legislator's own vote dilution claim, is immaterial. *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994); *see also Skaggs*, 110 F.3d, at 834. As the D.C. Circuit noted in *Michel*: "It could not be argued seriously that voters would not have an injury if their congressman was not permitted to vote at all on the House floor." 14 F.3d, at 626. Depriving voters of representation with the full weight guaranteed their representatives' votes by the Nevada Constitution's 2/3 requirement is only a difference in degree from the hypothetical embraced in *Michel* as a self-evident constitutional violation.

Here, by operation of Article 4, § 18(2) of the Nevada Constitution, Petitioners' constituents were entitled to representation with a vote sufficient to block a tax increase unless supported by 2/3 of the legislature. The Nevada Supreme Court's order "authorizing" the Legislature to ignore that constitutional provision, and to deem as "passed" a tax in-

crease that failed to garner the necessary 2/3 vote, diluted the representation to which Petitioners' constituents were entitled, and therefore diluted their right to vote.

The Nevada Supreme Court's decision below thus is fundamentally in conflict with well-established precedent of this Court, and in conflict with holdings of the D.C. Circuit in *Michel* and *Skaggs*. Certiorari is warranted.

E. Vote Nullification Claims

The Nevada Supreme Court's decision has also effectively nullified the votes successfully cast in support of the Gibbons Constitutional Tax Initiative in 1994 and 1996, by which an overwhelming percentage of Nevadans approved the 2/3 vote amendment to the state Constitution. The right to vote constitutes more than just the right to show up at a voting booth. It encompasses the right to have that vote counted and, if successful, to have the results of the vote given effect. *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *United States v. Mosley*, 238 U.S. 383, 386 (1915).

In authorizing the Nevada Legislature to adopt tax increases by "simple majority rule," the Nevada Supreme Court essentially treated the successful vote for the Gibbons Constitutional Tax Initiative as without any effect, at least whenever there is a budget stand-off involving spending for education. By so doing, the Nevada Supreme Court's decision deprived Nevada voters of their right to an effective vote, a right protected by the Fourteenth Amendment of the U.S. Constitution.

In addition, the Court's mandamus essentially authorized the State Assembly to give greater—indeed dispositive—weight to the votes of those who opposed the Gibbons Constitutional Tax Initiative, in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and

disparate treatment, value one person's vote over that of another") (citing *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 665 (1966)).[4]

Because these fundamental federal voting rights are so clearly established, and so clearly violated here, the Nevada Supreme Court's order is clearly contrary to the decisions of this Court and certiorari is warranted.

II. The Legislature's Adoption of a Tax Bill Did Not Moot this Case, and the Nevada Court's Refusal to Vacate Its Decision Only Perpetuates the Ongoing Republican Guarantee Problem.

The Nevada Court denied the petition for rehearing on mootness grounds, but because the Legislature's adoption of a tax bill did not moot this case, that erroneous decision does not present a vehicle problem to this Court's review.

There are several reasons why the case is not moot. First, the decision "authorizing" the Legislature to ignore the 2/3 vote provision of the Nevada Constitution remains on the books, where it "lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Second, the Assembly already took action on two bills, SB5 and SB6, in violation of the 2/3 vote provision. That the Legislature ultimately approved another bill by a 2/3 vote does not alter the vote dilution that occurred with respect to those bills.

Third, a case is not rendered moot by the voluntary cessation of complained-of conduct. When a party ceases

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[4] The fact that the Nevada Supreme Court ratified this debasement of the initiative voters is of no moment. *See Bush*, 531 U.S., at 107 (finding an equal protection violation by disparate recount procedures that were "ratified" by the Florida Supreme Court).

wrongful action, but remains able to repeat it in the future, the controversy remains alive and subject to adjudication. Thus, "however much the new regulation may reduce the practical importance of this case, it does not completely remove the controversy." *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000).

The Nevada Supreme Court itself acknowledged not just the possibility, but the likelihood, that the Legislature again will again ignore the 2/3 vote provision: "Because the State Distributive School Account is such a large component of the general fund, difficulties concerning the supermajority provision's application were certain to arise with respect to public school funding, no matter when addressed." Pet. App. 33a n.15. So did Senator Dina Titus, one of the Respondents here: "In the future when we do taxes, and we don't do them very often, they will always be tied to the DSA [education funding bill] because of this ruling." Las Vegas Sun (July 12, 2003). And the Nevada State Education Association ("NSEA"), one of the Governor's *amici* below, made the same point. In its brief opposing Counter-Petitioners' motion to vacate, the NSEA contended—repeatedly—that the Nevada Supreme Court should *not* vacate its decision precisely because the legislative stand-off that resulted from the 2/3 vote requirement of the Nevada Constitution was so capable of repetition every budget cycle. NSEA Br. at 5 (noting that the damage allegedly inflicted upon school districts by the 2/3 vote provision "has not somehow been undone by the recent passage of the school funding bill"); *id.* at 6 ("The [July 10] opinion should not be withdrawn, because the crisis that precipitated it is otherwise likely to recur"); *see also* NSEA Initial Br. at 6 n.7 ("it is *highly probably* that this [legislative] session will not be the last in which the Gibbons initiative will result in a budget crisis" (emphasis added)).

Even if this case were moot despite the Legislature's voluntary cessation, those same concessions demonstrate that the case is capable of repetition yet evading review, an exception to the mootness bar. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

Moreover, the Nevada Court's holding of mootness, based on action by Respondents, deprived Petitioners of the ability to challenge the Court's decision via their petition for rehearing. Vacatur of the decision was thus required under the Nevada equivalent of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *See Sunward Sales*, 843 P.2d, at 1208 (1982) ("we must dispose of the entire proceeding, not merely the appeal" when new legislation makes a case moot); *see also De La Teja v. United States*, 321 F.3d 1357, 1364 (11th Cir. 2003) ("when an issue in a case becomes moot on appeal, the court not only must dismiss as to the mooted issue, but also vacate the portion of the district court's order that addresses it"). The Nevada Supreme Court's refusal to vacate its decision in accord with its customary practice thus causes ongoing harm and exacerbates the due process problems, leaving in place a decision that concededly will continue to undermine a key structural limitation that the citizens of Nevada have imposed on their government.

CONCLUSION

The decision below has generated "public outrage" among Nevada citizens, as well it should, given the court's contempt for its own citizens and the Constitution they have established to reign in their government. *See, e.g.*, Martha Bellisle, "Activists want to oust justices who set Legislature back to work," Reno Gazette-Journal (July 18, 2003).[5]

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[5] Available at http://www.rgj.com/news/printstory.php?id=47301 (last visited Jan. 19, 2004) (noting the "public outrage").

Whether or not their anger ever erupts in a way comparable to Shay's Rebellion or the Whisky Rebellion, which gave rise to the protections of the Republican Guarantee Clause of Article IV, it is critically important that this Court issue a writ of certiorari to review the Nevada Supreme Court's decision. A judicial insurrection such as that manifested by the decision below may well be even more dangerous to the principles of republican government than the insurrections of farmers and debtors that gave the framers of our Constitution such cause for concern.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: January 20, 2004.

APPENDICES

Appendix A

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Honorable Kenny GUINN,

Governor of the State of Nevada,

Petitioner,

v.

The LEGISLATURE Of The STATE OF NEVADA; Honorable Lorraine T. Hunt, President of the Senate; Honorable Richard D. Perkins, Speaker of the Assembly; Mark E. Amodei, Senator; Terry Care, Senator; Maggie Carlton, Senator; Barbara Cegavske, Senator; Bob Coffin, Senator; Warren B. Hardy, Senator; Bernice Mathews, Senator; Mike McGinness, Senator; Joseph M. Neal, Jr., Senator; Dennis Nolan, Senator; Ann O'Connell, Senator; William J. Raggio, Senator; Raymond D. Rawson, Senator; Dean A. Rhoads, Senator; Michael Schneider, Senator; Raymond C. Shaffer, Senator; Sandra Tiffany, Senator; Dina Titus, Senator; Randolph Townsend, Senator; Maurice Washington, Senator; Valerie Wiener, Senator; Bernie Anderson, Assemblyman; Walter Andonov, Assemblyman; Sharron E. Angle, Assemblywoman; Morse Arberry, Jr., Assemblyman; Kelvin D. Atkinson, Assemblyman; Bob Beers, Assemblyman; David Brown, Assemblyman; Barbara E. Buckley, Assemblywoman; John C. Carpenter, Assemblyman; Vonne S. Chowning, Assemblywoman; Chad Christensen, Assemblyman; Jerry D. Claborn, Assemblyman; Tom Collins, Assemblyman; Marcus Conklin, Assemblyman; Jason Geddes, Assemblyman; Dawn Gibbons, Assemblywoman; Chris Giunchigliani, Assemblywoman; Pete Goicoechea, Assemblyman; David Goldwater, Assemblyman; Tom Grady, Assemblyman; Josh Griffin, Assemblyman; Don Gustavson, As-

semblyman; Joe Hardy, Assemblyman; Lynn C. Hettrick, Assemblyman; William C. Horne, Assemblyman; Ron Knecht, Assemblyman; Ellen M. Koivisto, Assemblywoman; Sheila Leslie, Assemblywoman; R. Garn Mabey, Jr., Assemblyman; Mark A. Manendo, Assemblyman; John A. Marvel, Assemblyman; Kathy McClain, Assemblywoman; Bob McCleary, Assemblyman; Harry Mortenson, Assemblyman; John Oceguera, Assemblyman; Genie Ohrenschall, Assemblywoman; David R. Parks, Assemblyman; Peggy Pierce, Assemblywoman; Rod Sherer, Assemblyman; Valerie Weber, Assemblywoman; and Wendell P. Williams, Assemblyman,

Respondents.

Lynn Hettrick; Garn Mabey; Bob Beers; Valerie Weber; Chad Christensen; Walter Andonov; David Brown; Sharron Angle; Don Gustavson; John Marvel; John Carpenter; Pete Goicoechea; Rod Sherer; Tom Grady; Ron Knecht; Barbara Cegavske; Mike McGinness; Ann O'Connell; Sandra Tiffany, and Maurice Washington, Members of the Legislature of Nevada,

Counter-Petitioners,

v.

Honorable Kenny Guinn, Governor of the State of Nevada, and the Legislature of the State of Nevada,

Counter-Respondents.

No. 41679.

July 10, 2003

Original petition for a writ of mandamus compelling the Legislature to fulfill its constitutional duties by a time certain and counter-petition for a writ of mandamus compelling the Governor to call a special session to consider the entire budget.

Petition granted in part as to the Legislature of the State of Nevada; petition denied as to the Lieutenant Governor and the individual members of the Legislature; counter-petition denied.

Brian Sandoval, Attorney General, and Jeff E. Parker, Solicitor General, Carson City, for Petitioner and Counter-Respondent.

Brenda J. Erdoes, Legislative Counsel, Carson City, for Respondents.

Allison, MacKenzie, Russell, Pavlakis, Wright & Fagan, Ltd., and Mark E. Amodei, Carson City, for Respondents Care and Amodei.

Barbara E. Buckley, Carson City, in Proper Person.

Beckley Singleton, Chtd., and Daniel F. Polsenberg and Beau Sterling, Las Vegas, for Counter-Petitioners.

Jeffrey S. Blanck, General Counsel, Washoe County School District, Reno; Walther Key Maupin Oats Cox & LeGoy and Michael E. Malloy, Reno, for Amicus Curiae Washoe County School District.

Dyer, Lawrence, Penrose, Flaherty & Donaldson and Michael W. Dyer, Carson City, for Amici Curiae Nevada State Education Association, Clark County Education Association, Education Support Employees Association of Clark County, and Washoe Education Association.

Ellsworth Moody & Bennion, Chtd., and Keen L. Ellsworth, Las Vegas, for Amicus Curiae Nevada Congress of Parents and Teachers Association.

C.W. Hoffman Jr., General Counsel, Las Vegas, for Amicus Curiae Clark County School District.

Law Offices of Thomas D. Beatty and Thomas D. Beatty, Las Vegas, for Amici Curiae Clark County Association of School Administrators, Washoe County Education Administrators, and Nevada Association of School Administrators.

McCracken Stemerman Bowen & Holsberry and Richard G. McCracken, Las Vegas, for Amici Curiae Nevada State AFL-CIO and Nevada State Employees Association, AFSCME, Local 4041.

McDonald Carano Wilson LLP and John J. Laxague, Michael A.T. Pagni, Jeffrey A. Silvestri and Thomas R.C. Wilson II, Reno, for Amici Curiae Nevada Taxpayers Association, Associated Builders and Contractors-Sierra Nevada Chapter, AGC Nevada, Nevada Association of Mechanical Contractors, Sierra Chemical Company, Polymer Plastics Corporation, Bath Electronics, EDAWN/ Western Nevada Development Authority, Nevada Consumer Finance Corporation, Nevada Petroleum Marketers and Convenience Store Association, Cal-Neva Franchise Owners Association, 7-Eleven Franchise Owners Association of Southern Nevada, Nevada Resident Agents Association, Monte L. Miller and Joshua C. Miller, Nevada Bankers Association, Nevada Manufacturers Association, Nevada Motor Transport Association, Retail Association of Nevada, Tiberti Fence Company, Carson City Chamber of Commerce, Las Vegas Chamber of Commerce, Nevada Franchised Auto Dealers Association, Nevadans for Real Tax Fairness, Household International, Nevada Corporate Headquarters--Cort Christie, Robert List, Henderson Chamber of Commerce, Thomas Powell, Pic-Mount Imaging, Corp., Phoenix Holdings of Nevada, Inc., Nevada Association of Independent Businesses, Chain Drug Council of Nevada, and Grocery Industry Council of Nevada.

Thomas J. Ray, General Counsel, Las Vegas, for Amicus Curiae University and Community College System of Nevada.

James T. Richardson, Reno, for Amicus Curiae Nevada Faculty Alliance.

Layne T. Rushforth, Las Vegas, for Amicus Curiae Nevada Concerned Citizens.

Wilson & Barrows and Stewart R. Wilson, Elko; Gregory T. Broderick, Sacramento, California, for Amicus Curiae Pacific Legal Foundation.

BEFORE THE COURT EN BANC.

OPINION

By the Court, AGOSTI, C.J.:

The Governor of Nevada has petitioned this court for a writ of mandamus declaring the Legislature to be in violation of the Nevada Constitution, and compelling the Legislature to fulfill its constitutional duty to approve a balanced budget —including an annual tax to defray the state's estimated expenses for the biennium beginning July 1, 2003, and appropriations to fund public education during that fiscal period— by a time certain. We agree that our intervention is appropriate in this extraordinary circumstance.

The Legislature failed to fund education in the 72nd Regular Session and in two special sessions and is evidently in a deadlock over the means of raising the necessary revenues. As a result, Nevada's public educational institutions are in crisis because they are unable to proceed with the preparations and functions necessary for the 2003-2004 school year.

It is apparent that the Legislature has failed to fulfill its constitutional mandate because of the conflict among several

provisions of the Nevada Constitution. Therefore, we, in our judicial role as interpreters of the Nevada Constitution, must reconcile the provisions which cause the present crisis. Because we conclude that the individual legislators and the Lieutenant Governor have not violated their constitutional duties, we deny the petition as to them as individuals. We grant the petition as to the Legislature as a body. We order the Legislature to fulfill its obligations under the Constitution of Nevada by raising sufficient revenues to fund education while maintaining a balanced budget. Due to the impasse that has resulted from the procedural and general constitutional requirement of passing revenue measures by a two-thirds majority, we conclude that this procedural requirement must give way to the substantive and specific constitutional mandate to fund public education. Therefore, we grant the petition in part and order the clerk of this court to issue a writ of mandamus directing the Legislature of the State of Nevada to proceed expeditiously with the 20th Special Session under simple majority rule.

DISCUSSION

The Governor filed this writ petition after the Legislature failed to approve a balanced budget before the start of fiscal year 2004, which started on July 1, 2003. The Governor is responsible for the faithful execution[1] of the state's laws and is also responsible for proposing a state budget and submitting it to the Legislature.[2] Pursuant to Article 9, Section 2 of our Constitution, the Legislature is responsible for approving a balanced budget. Also, Article 11, Section 6 of our Constitution compels the Legislature to support and maintain the public school system.[3] The Legislature must appropriate the

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[1] Nev. Const. art. 5, § 7.

[2] *Id.* art. 4, § 2(3).

[3] Nev. Const. art. 11, § 6 provides that "[i]n addition to other means provided for the support and maintenance of [the state] university and com-

money needed for all state government expenditures and provide for an annual tax to defray the state's estimated expenses for the two fiscal years following its regular biennial session.[4] Fiscal year 2004 began on July 1,[5] yet the Legislature has thus far failed in its obligation to support and maintain the public school system. No money has been appropriated to fund this constitutionally mandated obligation. Our Constitution's Article 4, Section 19 provides that the State Treasurer cannot release general funds from the state treasury without specific legislative appropriation.

The Governor began the 2003 legislative session with a request for $980 million in new revenues to balance his proposed budget for the 2003-2005 biennium. The Legislature did not fund education in its 72nd Regular Session, which ended on June 3, 2003,[6] but, after making substantial cuts in the Governor's budget, appropriated $3,264,269,361 for various government functions. The Governor signed these appropriations into law.[7] Existing revenues are expected to meet these appropriations.

Since the conclusion of the Legislature's general session, two special sessions have been convened. On June 3, 2003, the Governor convened the Legislature in the 19th Special Session to appropriate funds for the K-12 school system and to provide an adequate tax plan to provide for funding. The Legislature failed to reach an agreement on a tax plan. The

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mon schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund."

[4] Nev. Const. art. 9, § 2(1) provides that "[t]he legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year."

[5] Nev. Const. art. 9, § 1.

[6] Nev. Const. art. 4, § 2(2) limits the regular session to 120 days.

[7] All but three sections of this law took effect on July 1, 2003. Two provisions took effect on June 3, 2003, and one other will take effect on July 1, 2004. 2003 Nev. Stat., ch. 328.

Governor adjourned the 19th Special Session at the request of the Senate Majority Leader and the Speaker of the Assembly on June 12, 2003. That same day, the Governor convened the Legislature for a second special session to begin on June 25, 2003. The Legislature convened, but had not passed a bill to raise the required revenues for the educational system by the start of the new fiscal year, July 1, 2003. The Senate and Assembly recessed by mutual consent, because of their inability to pass a revenue measure by a two-thirds majority.

Since its enactment in 1864, the Nevada Constitution has required a simple majority of each house to pass a bill or joint resolution.[8] Article 4, Section 18(1) provides that "a majority of all the members elected to each house is necessary to pass every bill or joint resolution." In 1993, the Legislature rejected a resolution that proposed to amend the Constitution to create an exception to the simple majority rule and require a two-thirds majority of each house to increase existing taxes or impose new taxes. Ultimately, by initiative, the citizens accepted an identical proposal as a constitutional amendment. The constitutionally required second vote on the initiative occurred in 1996, at a time when the state enjoyed a budget surplus and public sentiment strongly favored restricted tax increases. Article 4, Section 18(2) of our Constitution now requires a two-thirds vote of each house "to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates."

In 1997, 1999 and 2001, the Legislature was able to work within these new constraints without major difficulties be-

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[8] *Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 837 (Andrew J. Marsh off. rep., 1866).

cause the state operated under a budget surplus and no major tax increases required a vote in the Legislature. By 2003, however, the state's economic picture had changed drastically. The Legislature, faced with a rapidly increasing population, a substantial budget deficit and record-high needs, was unable to reach a two- thirds majority and left its constitutional obligations unfulfilled.

The Legislature's failure to fulfill its constitutional duties by the beginning of the new fiscal year has precipitated an imminent fiscal emergency.[9] Nevada now faces an unprecedented budget crisis. Schools have not been funded for the upcoming school year. Teachers have not been hired. Educational programs have been eliminated. Planning for the academic year is not possible, and the state's bond rating may be jeopardized. This court has been petitioned to resolve the crisis. In light of the above circumstances, it appears there is no plain, speedy and adequate remedy in the ordinary course of law, and this court's intervention is warranted.[10]

At the heart of this case is the two-thirds supermajority requirement for revenue-raising legislation. The Legislature is unable to fulfill its constitutional duties to fund the public schools and to adopt a balanced budget because it has not met the two-thirds vote requirement. The Legislature's failure to provide funds for public education, to pass the concomitant revenue generating package and to balance the

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[9] Some of the pleadings argue that no emergency exists because the Governor and Legislature have methods of providing for education. We have no authority, under the separation of powers doctrine, to compel either the Governor or the Legislature to employ such methods to resolve any impasse.

[10] Nev. Const. art. 6, § 4; NRS 34.160 (providing that a writ of mandamus may issue to compel the performance of an act that the law especially enjoins as a duty resulting from an office, trust or station); NRS 34.170 (stating that a writ of mandamus may issue when there is no plain, speedy and adequate remedy in the ordinary course of law).

state's budget after having had the opportunities of one general session and two special sessions to do so, leads us to the inevitable conclusion that it is futile to order the Legislature to debate further within the parameters of Article 4, Section 18(2). As constitutional construction is purely a province of the judiciary,[11] we undertake to resolve the tension between the Legislature's constitutional obligation to fund public education and the constitutional provisions requiring a simple majority to enact appropriations bills but a two-thirds majority to generate or increase public revenue to fund those appropriations.[12]

Clearly, this court has no authority to levy taxes or make appropriations. Only our Legislature has been given the constitutional mandate to make appropriations, levy taxes, and to balance the state's budget.[13] However, when constitutional provisions are incompatible with one another or are unworkable, or when the enforcement of one prevents the fulfillment of another, this court must exercise its judicial function of interpreting the Constitution and attempt to resolve the problem.

When construing constitutional provisions, we apply the

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[11] *Marbury v. Madison,* 1 Cranch 137, 5 U.S. 137, 178, 2 L.Ed. 60 (1803); *State of Nevada v. Rosenthal,* 93 Nev. 36, 41, 559 P.2d 830, 834 (1977).

[12] We note that Article 4, Section 18(3) allows a simple majority of each legislative house's members to refer to the people any measure that creates, generates, or increases revenue. Under this section, however, the referral may only be made at the next general election, which will not occur until November 2004. NRS 293.12755. This sixteen-month delay renders any remedy under Section 18(3) inadequate, given the immediacy of the fiscal and educational crises facing our state.

[13] Nev. Const. art. 3, § 1 (providing for separation of powers); *id.* art. 4, § 1(vesting state's legislative authority in Senate and Assembly); *id.* art. 4, § 18; *id.* art. 9, § 2.

same rules of construction used to interpret statutes.[14] Our task is to ascertain the intent of those who enacted the provisions at issue, and "to adopt an interpretation that best captures their objective. We must give words their plain meaning unless doing so would violate the spirit of the provision."[15] Whenever possible, we construe provisions so that they are in harmony with each other.[16] Specific provisions take precedence over general provisions.[17] Finally, constitutional provisions should be interpreted so as to avoid absurd consequences and not produce public mischief.[18]

Nevada's Constitution clearly expresses the vital role that education plays in our state in Article 11. Of particular importance are Sections 1, 2, and 6. Section 1 mandates:

> The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof.

Section 2 mandates:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year ... and the legislature may pass such laws as will tend to secure a general atten-

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[14] *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001).

[15] *Id.*

[16] *See Bowyer v. Taack*, 107 Nev. 625, 627, 817 P.2d 1176, 1177 (1991); *see also People v. Anderson*, 6 Cal.3d 628, 100 Cal.Rptr. 152,493 P.2d 880, 886 (1972).

[17] *SIIS v. Surman*, 103 Nev. 366, 368, 741 P.2d 1357, 1359 (1987).

[18] *State v. Brodigan*, 44 Nev. 306, 311, 194 P. 845, 846-47 (1921).

> dance of the children in each school district upon said public schools.

And Section 6 requires the Legislature to provide for the support and maintenance of the public schools. Our Constitution's framers strongly believed that each child should have the opportunity to receive a basic education.[19] Their views resulted in a Constitution that places great importance on education. Its provisions demonstrate that education is a basic constitutional right in Nevada.

When a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield. Here, the application of the general procedural requirement for a two-thirds majority has prevented the Legislature as a body from performing its obligation to give life to the specific substantive educational rights enunciated in our Constitution. We agree with the Wyoming Supreme Court that "[c]onstitutional provisions imposing an affirmative mandatory duty upon the legislature are judicially enforceable in protecting individual rights, such as educational rights."[20] It is paramount that we give Section 18(2) a construction that will preserve the basic right of education.[21] Other states with constitutional provisions similar to ours have also given significant import to the educational clauses of their constitutions.[22]

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[19] See Debates & Proceedings of the Nevada State Constitutional Convention of 1864, at 567-72 (Andrew J. Marsh off. rep., 1866).

[20] *Campbell County School Dist. v. State,* 907 P.2d 1238, 1264 (Wyo.1995); *see also Washakie Co. Sch. Dist. No. One v. Herschler,* 606 P.2d 310 (Wyo.1980).

[21] *See Montana Power Co. v. Public Service Com'n,* 305 Mont. 260, 26 P.3d 91, 96 (2001) (stating that constructions which preserve constitutional rights are paramount).

[22] *See, e.g., Brigham v. State,* 166 Vt. 246, 692 A.2d 384, 391- 95 (1997); *Lake View Sch. Dist. No. 25 v. Huckabee,* 351 Ark. 31, 91 S.W.3d 472,

Our Legislature has failed to accomplish its constitutionally mandated tasks of funding Nevada's public education system and balancing the budget. In order to allow the Legislature to fulfill its constitutional mandate in this regard, the general language of Section 18(2) must give way to the simple majority requirement of Article 4, Section 18(1) in order that the specific provisions concerning education are not defeated.

Based upon the Legislature's failure over the last several weeks to fund the constitutionally mandated arena of education, we observe that its adherence to the Constitution's two-thirds majority provision defeats the Constitution's public education funding requirements. We conclude that an irreconcilable conflict exists with respect to the relevant constitutional provisions. Because the Governor has seen fit to petition this court in mandamus, and because evidently further legislative discussions are futile, it becomes the responsibility of this court to order the Legislature to fund public education and to balance the budget. It is a waste of public resources to simply tell the Legislature to forge on and deliberate and negotiate further, since that body has failed to perform its constitutionally required function. As a result, this court is faced with the onerous task of weighing the various constitutional provisions and, in effect, prioritizing them.

The two-thirds majority requirement is a procedural requirement. It is a process requirement by which legislative action is accomplished and decisions that weigh the public interests are accounted for. In the area of taxation this means that the Legislature must agree by a two-thirds majority as to which mechanisms will be employed to generate revenue. Without a two-thirds majority, revenue measures may not be enacted. This general constitutional provision does not purport to say what the substance of the revenue measures ought

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492-95 (2002), *cert. denied,* --- U.S. ----, 123 S.Ct. 2097, 155 L.Ed.2d 1066 (2003).

to be, only that whatever they be, they are acceptable to two-thirds of the elected members of each house of the Legislature.

In contrast, the Constitution requires specifically, as a matter of substantive constitutional law, that public education be funded. The framers have elevated the public education of the youth of Nevada to a position of constitutional primacy. Public education is a right that the people, and the youth, of Nevada are entitled, through the Constitution, to access. If the procedural two-thirds revenue vote requirement in effect denies the public its expectation of access to public education, then the two-thirds requirement must yield to the specific substantive educational right.

The Legislature must resume its work of funding education and selecting appropriate methods of revenue generation to balance the state's budget. Therefore, we grant the petition as to the Legislature of the State of Nevada and direct this court's clerk to issue a writ of mandamus directing the Legislature to proceed expeditiously with the 20th Special Session under simple majority rule. The relief prayed for in the petition as to the Lieutenant Governor and the individual legislators and in the counter-petition is denied.

/s Agosti, C.J.

We concur:

/s Shearing, J.

/s Rose, J.

/s Leavitt, J.

/s Becker, J.

/s Gibbons, J.

MAUPIN, J., dissenting in part and concurring in part:

The Governor's petition seeks our intervention to judicially pronounce that the Legislature has violated Articles 9 and 11 of the State Constitution by its failure to fund the education budget and balance the budget over the next two fiscal years. He also seeks an order requiring legislative compliance with these constitutional provisions, via passage of taxing measures to defray the state's estimated expenses for the biennium beginning July 1, 2003, within a time certain. I would decline the Governor's invitation to intervene in the legislative budgetary process--a process that represents the discretionary authority of a co-equal branch of the state government--*at this time.* In this, I would note that none of the parties directly named in this litigation, including the Governor, have requested the specific relief we provide today. I also note that the legislative response to the petition acknowledges the Legislature's constitutional obligations concerning the budget.

The Governor filed this writ petition because the Legislature failed to approve a balanced budget before the start of the new fiscal year. I acknowledge, with the majority, the following undisputed features of this controversy. First, that the Governor is responsible for seeing that this state's laws are faithfully executed[1] and for proposing a state budget and submitting it to the Legislature.[2] Second, that our Constitution requires the Legislature to approve a balanced budget. Third, that it also compels the Legislature to support and maintain the public school system.[3] Fourth, that the Legislature must appropriate the money needed for all state gov-

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[1] Nev. Const. art. 5, § 7.

[2] *Id.* art. 4, § 2(3).

[3] Nev. Const. art. 11, § 6 provides that "[i]n addition to other means provided for the support and maintenance of [the state] university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund."

ernment expenditures and must provide for an annual tax to defray the state's estimated expenses for the two fiscal years following its regular biennial session.[4] Fifth, that the state's current fiscal year commenced July 1, 2003,[5] and that the State Treasurer may not release general funds from the state treasury without specific legislative appropriation.[6] All of this notwithstanding, now that the Governor has called the Legislature into special session to resolve the budget impasse over the Distributive School Account (DSA), the Legislature is under no express constitutional duty to pass its appropriations and tax bills by the beginning of the fiscal year.[7] Indeed, in the last ten years, the Legislature has worked beyond the fiscal year's beginning three times. That the Legislature has had more than enough time to comply with the funding mandates is constitutionally beside the point. Because the first quarterly distribution of funds to the various county school districts for this fiscal year will not occur until August 1, 2003,[8] there is still a short window within which the Legislature can itself insure compliance with the constitutional mandate for public school funding. Accordingly, I would defer the relief afforded by today's majority until it becomes evident that the constitutional mandate to fund edu-

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[4] Nev. Const. art. 9, § 2(1) provides that "[t]he legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year."

[5] Nev. Const. art. 9, § 1.

[6] *Id.* art. 4, § 19.

[7] Article 4, Section 2(2) of the State Constitution limits regular legislative sessions to 120 days and renders void legislative action taken at any other time except where, as here, the Governor has convened a special legislative session.

[8] NRS 387.124(1) requires the state superintendent of public instruction to apportion the state DSA in the state general fund among the several county school districts on a quarterly basis, starting on or before August 1, November 1, February 1, and May 1 of each year. The DSA must be funded for the current biennium for this to occur.

cation will not be satisfied in time for compliance with the statutory requirements for distribution of state funds to local school districts.

Remedies sought by the Governor

Simply stated, the Governor seeks a judicial declaration that the Legislature has violated the Constitution and an order that the Legislature comply with it. This, in my view, will not provide a solution, other than to chastise the Legislature for its inability to deal with the voting impasse in which it is now embroiled. The Legislature concedes its constitutional obligation to fund public education. Why the relief actually sought in the petition will not effect a concrete solution is explained immediately below.[9]

As a threshold matter, the separation of powers doctrine stands as an impediment to our immediate involvement. Subject only to the reservation of the legislative power to the people in Article 19, our Constitution bestows all legislative authority upon the Legislature.[10] It seems well settled that "a court will not issue the writ of mandamus to compel a state legislature or an officer of such legislature to exercise their legislative functions or to perform duties involving the exercise of discretion."[11] This rule is expressed in the Nevada

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[9] *See Campaign for Fiscal Equity, Inc. v. State of New York*, ---N.Y.2d ---, --- N.Y.S.2d ----, --- N.E.2d ----, 2003 WL 21468502, at *---- (N.Y. June 26, 2003) (noting that simple direction of education authorities to follow the New York State Constitution is problematic in terms of effecting compliance and in terms of providing adequate judicial redress for a constitutionally infirm education funding system).

[10] Nev. Const. art. 4, § 1; *see generally* Nev. Const. art. 19.

[11] R.T.K., Annotation, *Mandamus to Members or Officer of Legislature*, 136 A.L.R. 677, 677 (1942); *e.g., Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979) (holding that a writ of mandamus could not be issued to compel legislative officers to adjourn or attempt to adjourn the legislature, or to obtain an adjournment from the governor); *Limits v. President of the Senate*, 414 Mass. 31, 604 N.E.2d 1307 (1992) (denying mandamus relief to compel the state legislature's action on a proposed constitu-

Constitution:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,--the Legislative,--the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.[12]

Certainly, the specifics of creating a budget fall within the discretion of the Legislature.

We are asked in the Governor's petition, at least implicitly, to intervene in the current legislative controversy to force individual members of the Legislature to vote (exercise their discretion) in a certain way. Because the people of this state elected the individual members of the Legislature and their primacy to vote as they so choose, we cannot grant this relief. The pre- eminent right of individual lawmakers is to vote their consciences on individual measures. Their individual votes do not violate the Constitution, their votes as a body *may* do so.

For similar reasons, we either cannot or should not, as suggested by some of the legislators, order the Governor to amend the parameters of the special session to open previously closed budget accounts. First, this form of relief would only make a balanced budget *possible;* second, such relief would impinge upon the prerogatives of the executive branch to define the scope of special sessions.[13] This is underscored by the fact that a balanced budget is possible now; it is just

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tional amendment); *State ex rel. Daschbach v. Meyers,* 38 Wash.2d 330, 229 P.2d 506 (1951) (declining to issue a writ of mandamus compelling legislature to affix on a bill a different date of passage).

[12] Nev. Const. art. 3, § 1(1).

[13] *See State v. Dickerson,* 33 Nev. 540, 562, 113 P. 105, 111 (1910).

improbable under the current parameters of the special session. Thus, in my view, we cannot constitutionally order any member of the Legislature to vote in a certain way and we cannot order the Governor to open budgets to create a mere possibility that the Legislature can arrive at a balanced budget.[14] As of now, neither the Governor nor any individual legislator has violated the Constitution.[15] This having been said, compliance with the constitutional mandate to appropriate state education funding must occur in sufficient time to allow the quarterly distribution to county school districts on or before August 1, 2003, per NRS 387.124(1).

Remedy afforded by the court

Given our intervention, the petition necessarily seeks our resolution of separate mandatory provisions in the Nevada Constitution that *may* remain in conflict in the current application. Section 6 of Article 11 mandates legislative funding for Nevada schools, the budget for which may be set by a simple majority of each house of the Legislature. Section 2(1) of Article 9 requires that additional taxes be created whenever projections indicate state revenue will be insufficient to defray estimated expenses of the state. And Section 18(2) of Article 4 requires that any increase in taxes must be approved by two-thirds of the members of each legislative body. Thus, while the state's education budget may be set by simple majorities of each legislative house, any new taxes to fund the budget may only be accomplished via supermajority. These provisions are not inherently in conflict; they only conflict in the event education funding is prevented by an inability to balance the budget with sufficient funding mecha-

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[14] *Id.*

[15] I recognize the Majority's concern that failure to provide immediate appropriations to fund the DSA will impede county school district planning and the hiring of personnel. While this is very important, it does not, in my view, require resolution of the constitutional impasse by immediate intervention by this court.

nisms. That is the current state of affairs, as described by the majority.

I would now turn to address the following observations submitted by the Legislature in its response to the Governor's petition:

> With respect to the allegation that the Legislature has not balanced the state budget for the next two fiscal years, and not done so in a timely manner, that allegation is simply erroneous....
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> ....
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> ... [T]he Legislature has worked diligently to fulfill its constitutional duties and continues to engage in such work, and ... complete its duties as soon as possible.
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> ....
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> ... The Answering Respondents [the Legislature] agree that the Legislature has a mandatory duty to provide money for education and to ensure adequate revenue to pay state expenses.

The Legislature goes on in its papers filed in this case to request our forbearance to allow it to acquit its admitted constitutional responsibility to fund a state education budget. I can only observe that this Legislature has completed the mandatory 120-day session, has been convened twice in special session and has failed to fund the DSA and balance the budget. It has had plenty of time to fulfill its constitutional obligations. I would give the Legislature more time; but the exigencies of the current situation require some dispatch.

Absent the immediate relief now being afforded, the Governor, of course, would have been free to amend the scope of the special session to facilitate a resolution. Also, individual legislators could, upon further deliberation, have relented to help comply with the supermajority requirements. And, as stated, there was still a window of opportunity for

the two branches of government to resolve the impasse without our assistance. In the absence of an education budget crafted and funded in time to effect statutory distribution of funds to the county school districts, we could appropriately declare the impasse at an end because time then would truly be of the essence.[16] Accordingly, I would give the Legislature until July 28, 2003, to resolve the impasse[17] before intervening and considering the relief afforded today, along with other possibilities.[18]

I take this opportunity to comment upon the dynamic that brings us to this point in our state's history. For years, a philosophical debate over provision of state services has been developing and is highlighted by the unparalleled population growth here in Nevada and economic conditions governed by external forces, including those attendant to the attacks of September 11, 2001. This debate is the signal feature of the 2003 legislative sessions. The primary concerns of both sets of antagonists involve the quality of state services, the extent to which state services need to be expanded and/or improved, including education services for our children, and unwise or wasteful use of state resources; resources that are paid for by the citizens of this state. This debate has been conducted in a true democratic spirit and both sides have admirably stated their cases. In my view, taking judicial notice of the public debate, considerable waste has been re-

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[16] *See supra* note 8.

[17] *Id.*

[18] Again, we are powerless to order co-equal branches of government to exercise individual acts of constitutional discretion. Our authority depends upon whether extraordinary relief is warranted and in exercising our authority to grant relief, we would be restricted to an interpretation of the Constitution, utilizing recognized tenets of statutory construction. *See Nevada Mining Ass'n v. Erdoes,* 117 Nev. 531, 538, 26 P.3d 753, 757 (2001) (when construing constitutional provisions, the Nevada Supreme Court uses the same rules of construction that are used to interpret statutes).

vealed, services can be improved, and many in our state government have been working to improve the situation. Nevertheless, it is not evident that the totality of fiscal problems facing Nevada will be solved in the near term. What is evident is that our schools must, as matter of constitutional law, be funded on or before August 1, 2003.

s/ Maupin, J.

Appendix B

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Honorable Kenny GUINN,
Governor of the State of Nevada,

Petitioner,

vs.

The LEGISLATURE OF the STATE OF NEVADA; Honorable Lorraine T. Hunt, President of the Senate; Honorable Richard D. Perkins, Speaker of the Assembly; Mark E. Amodei, Senator; Terry Care, Senator; Maggie Carlton, Senator; Barbara Cegavske, Senator; Bob Coffin, Senator; Warren B. Hardy, Senator; Bernice Mathews, Senator; Mike McGinness, Senator; Joseph M. Neal, Jr., Senator; Dennis Nolan, Senator; Ann O'Connell, Senator; William J. Raggio, Senator; Raymond D. Rawson, Senator; Dean A. Rhoads, Senator; Michael Schneider, Senator; Raymond C. Shaffer, Senator; Sandra Tiffany, Senator; Dina Titus, Senator; Randolph Townsend, Senator; Maurice Washington, Senator; Valerie Wiener, Senator; Bernie Anderson, Assemblyman; Walter Andonov, Assemblyman; Sharron E. Angle, Assemblywoman; Morse Arberry, Jr., Assemblyman; Kelvin D. Atkinson, Assemblyman; Bob Beers, Assemblyman; David Brown, Assemblyman; Barbara E. Buckley, Assemblywoman; John C. Carpenter, Assemblyman; Vonne S. Chowning, Assemblywoman; Chad Christensen, Assemblyman; Jerry D. Claborn, Assemblyman; Tom Collins, Assemblyman; Marcus Conklin, Assemblyman; Jason Geddes, Assemblyman; Dawn Gibbons, Assemblywoman; Chris Giunchigliani, Assemblywoman; Pete Goicoechea, Assemblyman; David Goldwater, Assemblyman; Tom Grady, Assemblyman; Josh Griffin, Assemblyman; Don Gustavson, As-

semblyman; Joe Hardy, Assemblyman; Lynn C. Hettrick, Assemblyman; William C. Horne, Assemblyman; Ron Knecht, Assemblyman; Ellen M. Koivisto, Assemblywoman; Sheila Leslie, Assemblywoman; R. Garn Mabey, Jr., Assemblyman; Mark A. Manendo, Assemblyman; John A. Marvel, Assemblyman; Kathy McClain, Assemblywoman; Bob McCleary, Assemblyman; Harry Mortenson, Assemblyman; John Oceguera, Assemblyman; Genie Ohrenschall, Assemblywoman; David R. Parks, Assemblyman; Peggy Pierce, Assemblywoman; Rod Sherer, Assemblyman; Valerie Weber, Assemblywoman; and Wendell P. Williams, Assemblyman,

Respondents.

Lynn Hettrick; Garn Mabey; Bob Beers; Valerie Weber; Chad Christensen; Walter Andonov; David Brown; Sharron Angle; Don Gustavson; John Marvel; John Carpenter; Pete Goicoechea; Rod Sherer; Tom Grady; Ron Knecht; Barbara Cegavske; Mike McGinness; Ann O'Connell; Sandra Tiffany, and Maurice Washington, Members of the Legislature of Nevada,

Counter-Petitioners,

vs.

Honorable Kenny Guinn, Governor of the State of Nevada, and the Legislature of the State of Nevada,

Counter-Respondents.

No. 41679.

Sept. 17, 2003

Petition for rehearing of *Governor v. Nevada State Legislature*, 119 Nev. ___, 71 P.3d 1269 (2003).

Petition dismissed; opinion clarified.

Brian Sandoval, Attorney General, and Jeff E. Parker, Solicitor General, Carson City, for Petitioner and Counter-Respondent.

Brenda J. Erdoes, Legislative Counsel, Carson City; Hale Lane Peek Dennison & Howard and N. Patrick Flanagan III, Reno, for Respondent Nevada State Legislature.

Allison, MacKenzie, Russell, Pavlakis, Wright & Fagan, Ltd., and Mark E. Amodei, Carson City, for Respondents Terry Care and Mark E. Amodei.

Kathleen J. England, Las Vegas, for Respondent Morse Arberry, Jr.

Barbara E. Buckley, Carson City, in Proper Person.

Beckley Singleton, Chtd., and Daniel F. Polsenberg and Beau Sterling, Las Vegas, for Counter-Petitioners.

Jeffrey S. Blanck, General Counsel, Washoe County School District, Reno; Walther Key Maupin Oats Cox & LeGoy and Michael E. Malloy, Reno, for Amicus Curiae Washoe County School District.

Dyer, Lawrence, Penrose, Flaherty & Donaldson and Michael W. Dyer, Carson City, for Amici Curiae Nevada State Education Association, Clark County Education Association, Education Support Employees Association of Clark County, and Washoe Education Association.

Ellsworth Moody & Bennion, Chtd., and Keen L. Ellsworth, Las Vegas, for Amicus Curiae Nevada Congress of Parents and Teachers Association.

C.W. Hoffman Jr., General Counsel, Las Vegas, for Amicus Curiae Clark County School District.

Law Offices of Thomas D. Beatty and Thomas D. Beatty, Las Vegas, for Amici Curiae Clark County Association of School Administrators, Washoe County Education Administrators, and Nevada Association of School Administrators.

McCracken Stemerman Bowen & Holsberry and Richard G. McCracken, Las Vegas, for Amici Curiae Nevada State AFL-CIO and Nevada State Employees Association, AFSCME, Local 4041.

McDonald Carano Wilson LLP and John J. Laxague, Michael A.T. Pagni, Jeffrey A. Silvestri and Thomas R.C. Wilson II, Reno, for Amici Curiae Nevada Taxpayers Association, Associated Builders and Contractors-Sierra Nevada Chapter, AGC Nevada, Nevada Association of Mechanical Contractors, Sierra Chemical Company, Polymer Plastics Corporation, Barth Electronics, EDAWN/ Western Nevada Development Authority, Nevada Consumer Finance Corporation, Nevada Petroleum Marketers and Convenience Store Association, Cal-Neva Franchise Owners Association, 7-Eleven Franchise Owners Association of Southern Nevada, Nevada Resident Agents Association, Monte L. Miller and Joshua C. Miller, Nevada Bankers Association, Nevada Manufacturers Association, Nevada Motor Transport Association, Retail Association of Nevada, Tiberti Fence Company, Carson City Chamber of Commerce, Las Vegas Chamber of Commerce, Nevada Franchised Auto Dealers Association, Nevadans for Real Tax Fairness, Household International, Nevada Corporate Headquarters--Cort Christie, Robert List, Henderson Chamber of Commerce, Thomas Powell, Pic-Mount Imaging, Corp., Phoenix Holdings of Nevada, Inc., Nevada Association of Independent Businesses, Chain Drug Council of Nevada, and Grocery Industry Council of Nevada.

Thomas J. Ray, General Counsel, Las Vegas, for Amicus Curiae University and Community College System of Nevada.

James T. Richardson, Reno, for Amicus Curiae Nevada Faculty Alliance.

Layne T. Rushforth, Las Vegas, for Amicus Curiae Nevada Concerned Citizens.

Wilson & Barrows and Stewart R. Wilson, Elko; Gregory T. Broderick, Sacramento, California, for Amicus Curiae Pacific Legal Foundation.

BEFORE THE COURT EN BANC.

OPINION

PER CURIAM:

On July 10, 2003, we entered an opinion in this matter partially granting the Governor's petition for a writ of mandamus and denying the counter-petition filed by twenty Legislators. Our opinion directed this court's clerk to issue a writ directing the Legislature "to proceed expeditiously with the 20th Special Session under simple majority rule." The impetus for the writ petition, and our opinion, was the Nevada Legislature's continued failure to appropriate funds for the K-12 school system and to balance the state's budget by providing an adequate revenue plan to defray the state's estimated expenses for the biennium beginning July 1, 2003.

On July 21, 2003, the counter-petitioners filed a rehearing petition, asking us to recall our writ of mandamus, reconsider our opinion, and grant one of the remedies suggested in the counter-petition. Later that same day, the Legislature fulfilled its constitutional duties to fund the public school system and balance the budget, and it adopted the revenue-raising legislation required to balance the budget by a two-thirds supermajority. According to the Legislature,

> the Court's ruling in this case facilitated a shift from the tension that was caused by an externally-imposed

> requirement to achieve a 2/3 consensus, to a situation where the legislators were internally motivated to achieve a 2/3 consensus voluntarily. This shift in perception allowed reevaluation of fixed positions which led expeditiously to the passage of Senate Bill No. 8 ....

The counter-petitioners then supplemented their rehearing petition and moved this court to withdraw its opinion. At our direction, the Governor and Legislature responded to the rehearing petition. Assemblyman Arberry filed a supplemental response. Amici Curiae Education Associations[1] and the Pacific Legal Foundation also filed responses. Counter-petitioners filed a reply.

The Legislative stalemate that was thrust upon us was the result of a recent Nevada constitutional amendment requiring a two-thirds majority to pass legislation that creates, generates or increases any public revenue, including taxes. The Senate had passed legislation that would have completed the budget process, but the Assembly had deadlocked and could not garner the necessary two-thirds vote because of a difference of opinion among Assembly members over the role the two-thirds provision played in the budget process. The deadlock prevented the Assembly from funding the K-12 appropriations bill and balancing the budget.

We concluded, based on the calamitous circumstances facing our state, that the Legislature could proceed with the 20th Special Session under a simple majority requirement, given that the dispute over the two-thirds majority requirement's applicability to the budget process had prevented the Legislature during one regular and two special sessions from fulfilling its constitutional duties to appropriate funds and to

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[1] Nevada State Education Association, Clark County Education Association, Education Support Employees Association of Clark County and Washoe Education Association.

maintain the public school system while balancing the budget. Accordingly, we granted the petition as to the Legislature as a body, but denied the petition as to the individual legislators and the Lieutenant Governor. We also denied the counter-petition, which requested us to determine that the two-thirds supermajority provision applied not only to increases in revenue, but to the budget itself.

BACKGROUND

The Nevada Constitution has, since it was enacted, required that bills and joint resolutions be passed by a simple majority of each house. Article 4, Section 18(1) originally provided that "a majority of all the members elected to each house is necessary to pass every bill or joint resolution."[2] In 1993, a member of the Legislature sponsored a resolution that proposed amending the Constitution to require a two-thirds majority of each house to increase certain existing taxes or impose new taxes.

At a hearing on the proposed resolution, legislators asked one of the main proponents if the other states with similar provisions required a supermajority to approve the state budget as well as new taxes, or if these states retained a simple majority for budget approval and a supermajority for funding.[3] Legislative members pointed out to the proponent that the proposed amendment did not address the budget, only changes in revenue. Thus the Constitution, if amended, would require a two-thirds majority to change the existing revenue structure, but only a simple majority to approve the

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[2] Debates & Proceedings of the Nevada State Constitutional Convention of 1864, at 837 (Andrew J. Marsh off. rep., 1866) [hereinafter Debates & Proceedings].

[3] Hearing on A.J.R. 21 Before the Assembly Comm. on Taxation, 67th Leg. (Nev., May 4, 1993) (discussions involving Assembly members James A. Gibbons, Larry L. Spitler and Myrna T. Williams).

budget.[4]

The members noted that once the budget is approved, the Nevada Constitution requires that revenue be increased to balance the budget where the cost of services exceeds projected revenue.[5] Finally, the legislators expressed their concerns that the proposed language would create the potential for a constitutional crisis because a minority of legislators might disagree with the majority's lawfully approved budget and therefore refuse to consider any revenue increases until their budgetary concerns were met, thus creating a deadlock. The amendment, according to one legislator, "was actually empowering a smaller group of people not to fund the budget."[6] The legislators were concerned that the process would allow a minority of the Legislature, representing a minority of this State's citizens, to control public services, contrary to the wishes of a majority of the Legislature, representing a majority of the citizens.[7]

The proponent did not answer the questions posed by other legislators, but indicated that the issues would be researched and additional information would be provided to committee members.[8] The record does not reflect whether additional information was provided, and the Legislature declined to approve the proposal.[9] The proponents then took

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] In answer to the question concerning minority control, at least one state, Florida, has adopted some flexibility in its supermajority tax provision. Florida does not include money necessary to support state bonds in the supermajority requirement and permits increases when necessary to offset changes in federal laws, such as Medicare, that impact the state. Fla. Const. art. VII, § 1(e). Oregon, with a legislature that also meets biennially, allows its equivalent of Nevada's Interim Finance Committee to ap-

the proposal directly to Nevada's voters through the initiative process.

Unfortunately, the initiative petition and proposed amendment did not resolve the conflict discussed in the legislative hearings. Although the initiative's proponents were aware of the potential conflict that could result from requiring a simple majority for appropriations and a supermajority for new or increased public revenue, they did not specifically address this problem in the initiative's language. Nor did the arguments for and against passage, presented in the voter information and sample ballot pamphlet, discuss the issue or the effect the proposal could have on other constitutional rights or the state's overall fiscal integrity.[10] Nevada's voters passed the constitutional amendment in the 1994 and 1996 general elections.[11] Consequently, Nevada's Constitution, in Article 4, Section 18(2), now requires a two-thirds vote of each house "to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates." But the initiative did nothing to the constitutional mechanism for passing the underlying appropria-

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prove new programs and revenue to support those programs when the legislature is not in session, subject to retroactive approval at the next session. Or. Const. art. III, § 3.

[10] *Compare* Compilation of Ballot Questions 1996, Question No. 11, Arguments for Passage (stating that "[i]t may be more difficult for special interest groups to get increases they favor," and that it may require state government to prioritize and economize), *with id.* Arguments Against Passage (stating that "Nevada must remain flexible to change the tax base").

[11] *See* Nev. Const. art. 19, § 2(4) (providing that a constitutional amendment requires approval of a majority of the voters at two general elections).

tions bills,[12] which requires only a simple majority vote under Article 4, Section 18(1). Thus, the stage was set for legislative impasse.

As noted in our prior opinion, the Nevada Legislature, which currently meets only every other year for an abbreviated 120-day regular session,[13] adequately functioned within the new constraints in the 1997, 1999 and 2001 sessions. Then, the state had a budget surplus and the budget could be balanced without major tax increases. By 2003, however, the state's economic situation had changed drastically.

The impact of terrorism, economic recession and increases in population caused the Governor to begin the 2003 legislative session with a $980 million request for new revenue to balance his proposed budget for the 2003-2005 biennium. The revenue request was based on the need to recover revenue shortfalls caused by the downward trend in Nevada's economy after the terrorist attacks of September 11, 2001, and increased expenses relating to terrorism, growth and changes mandated by federal laws. Over the four-month regular session, the proposed budget was reduced by approximately $135 million. However, philosophical differences still permeated the final days of the regular legislative session. Consequently, by the June 3 conclusion of the 2003 regular session, the Legislature did not complete its constitutional duty to approve a balanced budget, but it appropriated $3,264,269,361 for various government functions and the

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[12] Nevada's budget is composed of several separate bills: the General Appropriations Act (funds most state government); the Authorized Expenditure Act; the bill appropriating funds to the State Distributive School Account (funding K-12 education); the Class-Size Reduction Act; the Capital Improvement Bill (authorizing construction, maintenance and repair of state buildings); and the Unclassified Pay Bill.

[13] Nev. Const. art. 4, §§ 2(1), 2(2). The 1997 session was not subject to the 120-day limitation, as the limit was not approved by the voters until 1998.

Governor signed these appropriations into law.[14]

The Legislature further failed in its constitutional duty to appropriate funds for Nevada's public school system.[15] This funding dilemma apparently resulted from a confluence of factors, including the abbreviated nature of the regular legislative session; the need to address the comprehensive mandates of the new Federal No Child Left Behind Act;[16] and policy disagreements between the Senate and Assembly in regard to consolidating certain childhood educational programs, implementing class-size reduction programs, earmarking money for textbooks and other instructional materials, and encouraging experienced teachers to work in at-risk schools or schools designated as needing improvement and, of course, the revenue shortfalls.

On June 3, 2003, the Governor convened the 19th Special Session of the Legislature to appropriate funds for public education and to provide a tax plan sufficient to pay for the state's services and balance the final budget.[17] On June 6, 2003, the Senate passed Senate Bill 2 to authorize and appropriate the State Distributive School Account (SDSA) in the general fund for the fiscal years beginning July 1, 2003, and July 1, 2004. But Senate Bill 2 lacked the votes necessary to pass the Assembly, because the passage of the bill, without a revenue plan, would violate the balanced budget provisions of the Constitution. Certain Assembly members insisted that the two-thirds requirement applied to the budget

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[14] All but three sections of this law took effect on July 1, 2003. Two provisions took effect on June 3, 2003, and one other will take effect on July 1, 2004. 2003 Nev. Stat., chs. 327, 328 and 441.

[15] Nev. Const. art. 11, § 6. Because the State Distributive School Account is such a large component of the general fund, difficulties concerning the supermajority provision's application were certain to arise with respect to public school funding, no matter when addressed.

[16] 20 U.S.C. §§ 6301-7014.

[17] Nev. Const. art. 5, § 9; *id.* art. 4, § 2(2).

as well as the tax structure. These individuals argued that the Governor should expand the special session to include all components of the budget and that the budget process be reopened so cuts in services as well as tax increases could be considered in reaching a balanced budget.

Because the majority of the Legislature did not agree with this interpretation and the request to reopen the budget process, no progress on finalizing and balancing the budget was made and public schools remained unfunded. Consequently, on June 12, 2003, the Governor adjourned the 19th Special Session as requested by the Senate Majority Leader and the Speaker of the Assembly.

With no end to the stalemate in sight, the Governor convened the Legislature that same day for a second special session (the 20th Special Session) to begin on June 25, 2003.[18] On the first day of that session, the Senate unanimously passed Senate Bill 5 to authorize and appropriate the SDSA, and transmitted the legislation to the Assembly. In addition, the Senate, by the constitutionally mandated two-thirds majority, passed tax measures that provided a balanced budget for the 2003-2005 biennium, Senate Bills 2 and 6. Once again, Senate Bill 2 was not passed out of the Assembly. Assembly members sought, however, to amend Senate Bill 6 to incorporate the SDSA authorization and appropriations and provide sufficient taxes to balance the budget. But faced with renewed demands that the budget be reopened for cuts in spending, the Assembly twice failed to pass the amended bill by the required two-thirds majority; both votes were 27 to 15, one vote shy of the constitutionally mandated supermajority.

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[18] At this point, the special sessions were reportedly costing the taxpayers $50,000 per day.

The Governor, who is responsible for ensuring that Nevada's laws are faithfully executed[19] and for submitting a proposed state budget to the Legislature,[20] filed a petition for a writ of mandamus at the start of the fiscal year, July 1, 2003, seeking to compel the Legislature to fulfill its constitutional duties by funding K-12 public education and passing a balanced budget. The Legislature, in its official response to the petition, asserted that a writ should not issue because no dispute existed over the interpretation of the Constitution and the Legislature simply needed more time to come to a consensus. The Legislature indicated, through counsel, that the plain language of the Constitution required a simple majority to pass the budget, while the supermajority provisions only applied to a specific proposal to increase, change or create taxes, not the total amount of revenue to be generated.

The Legislature reached this conclusion using standard rules of constitutional construction. In its answer, the Legislature indicated that its construction was the only way to harmonize the simple majority provision for the budget with the supermajority provision for taxes and the constitutional requirement that revenues shall be raised to balance a budget. According to the Legislature, when a legislative majority approves a budget, it does so with full knowledge of the revenue projections and the Constitution's mandatory balanced budget provisions. As the Legislature noted, when an approved budget exceeds the projected revenues, the Constitution requires that revenues be raised to balance the budget. By approving the budget, the majority has already decided that the expenditures for services embodied in the budget are necessary and that revenue must be increased to provide for them. Thus, the majority decides whether additional revenue is necessary and the total amount of revenue that needs to be raised to balance the budget. The manner in

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[19] Nev. Const. art. 5, § 7.

[20] *Id.* art. 4, § 2(3).

which revenues will be raised, that is, the specific changes in the tax structure, then requires supermajority approval.

However, a minority of legislators disagreed with the official response. They filed a separate answer and counter-petition. The counter- petition sought to compel the Governor to call a special session to consider and make cuts to the entire state budget and requested this court to hold the supermajority provision applies to the budget process whenever a budget requires revenue increases. The counter-petitioners acknowledged that a substantial tax increase was necessary; however, they disagreed on the gross amount of the increase. The issue, according to these legislators, was not whether there would be a tax increase, but the necessity of a particular amount. Each scenario envisioned a several hundred million dollar tax increase. The impasse continued even though the writ petition was pending. The Legislature recessed at the call of the majority leaders of both houses. With the beginning of the new fiscal year came an imminent and grave crisis, caused by the Legislature's failure to complete its constitutional duties. Particularly at risk was Nevada's K-12 public education system. The school districts' window for recruiting high quality teachers to comply with the No Child Left Behind Act was closing. Anticipating vacant teaching positions, school districts were eliminating special education programs. Both prospective and current teachers began to question their employment in Nevada. The lack of a balanced budget was also not without serious consequences, as it threatened Nevada's bond rating.

This unprecedented crisis arose because of the two antagonistic constitutional provisions with which the Legislature is saddled. Article 4, Section 18(1) requires only a simple majority to enact appropriations bills, but Article 4, Section 18(2) requires a supermajority to generate or increase public revenue to fund those appropriations. That these provisions occupy antagonistic positions was apparent from the

various respondents' conflicting interpretations. The counter-petitioners argued that the supermajority provision for generating public revenue trumps Section 18(1)'s requirement that all other bills, including appropriations, be passed by a simple majority whenever the appropriations call for a tax increase. According to these legislators, the general appropriations bill, passed by a majority of the Legislature, was void because it was not passed by a two-thirds supermajority. The respondent Legislature, on the other hand, asserted that the minority legislators' interpretation frustrates the plain language of Section 18(1). According to the Legislature, "it is evident that [the supermajority] provision does not require a two-thirds vote in regard to a legislative measure which appropriates money, but which does not actually create, generate, or increase public revenue." Faced with these differing views on the supermajority requirement's application, it became our task, as the ultimate custodians of constitutional meaning, to balance Sections 18(1) and 18(2) so as to preserve and credit both clauses to the maximum extent possible.[21]

In construing the Constitution, our primary objective is to discern the intent of those who enacted the provisions at issue, and to fashion an interpretation consistent with that objective.[22] However, when the enactors' intent cannot be determined, rules of constitutional construction require us to attempt to harmonize differing provisions so as to give as much effect as possible to each provision.[23] We look beyond

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[21] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803); *State v. Rosenthal*, 93 Nev. 36, 41, 559 P.2d 830, 834 (1977); *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo.1996); *Denish v. Johnson*, 121 N.M. 280, 910 P.2d 914, 922 (1996).

[22] *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001); *accord In re Anthony R.*, 154 Cal.App.3d 772, 201 Cal.Rptr. 299, 302 (1984).

[23] *Bowyer v. Taack*, 107 Nev. 625, 627, 817 P.2d 1176, 1177 (1991); *Ex parte Shelor*, 33 Nev. 361, 375, 111 P. 291, 293 (1910).

the plain language of constitutional provisions to ascertain intent "when a construction is urged which would result in an absurd situation"[24] or when provisions are subject to conflicting interpretations.[25]

The language of Article 4, Section 18(1) and Article 4, Section 18(2) is clear on its face. But in operation, the two provisions resulted in legislative paralysis in one general and two special sessions. The parties advanced conflicting interpretations of the provisions' requirements. We thus looked to extrinsic evidence surrounding the supermajority provision's enactment to determine its intended effect.

As mentioned earlier, Article 4, Section 18(2) originated as Ballot Question 11 during the 1994 and 1996 general elections. The supermajority requirement was intended to make it more difficult for the Legislature to pass new taxes, hopefully encouraging efficiency and effectiveness in government. Its proponents argued that the tax restriction might also encourage state government to prioritize its spending and economize rather than explore new sources of revenue. But neither the ballot question nor its explanation in the voter pamphlet informed voters of the likelihood of legislative paralysis and its effect on the state's fiscal and educational integrity. Indeed, even the initiative's prime sponsor was unsure of the consequences of reposing within a small group of legislators the power to block majority-approved appropriations. And, in 1993, he represented to the Assembly that the supermajority requirement "would not hamstring

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[24] *Bussanich v. Douglas*, 152 Ariz. 447, 733 P.2d 644, 647 (Ariz.Ct.App. 1986).

[25] *See Soto v. Superior Court*, 190 Ariz. 450, 949 P.2d 539, 544 (Ariz. Ct. App. 1997); *Utah School Boards v. State Bd. of Educ.*, 17 P.3d 1125, 1129 (Utah 2001); *cf. Cook v. Maher*, 108 Nev. 1024, 842 P.2d 729 (1992) (resolving conflicting constitutional interpretations).

state government or prevent state government from responding to legitimate fiscal emergencies."[26]

The voters were not privy to the Assembly's concerns that culminated in the requirement's legislative rejection, and the requirement's proponents failed to address those concerns when presenting the initiative. Because the voters were not informed of the problems the amendment would cause if a minority of legislators disagreed with the majority over the level of services to be provided to Nevada citizens, we could not determine how the voters intended to resolve such a conflict.[27]

We were persuaded that the Legislature's view of the Constitution's plain language was correct. A simple majority is necessary to approve the budget and determine the need for raising revenue. A two-thirds supermajority is needed to determine what specific changes would be made to the existing tax structure to increase revenue. Consequently we rejected the counter-petitioners' interpretation and dismissed the counter-petition.

However, our dismissal of the counter-petition could not, standing alone, resolve the impasse. While we could direct the legislators to proceed with their constitutional duties to pass a balanced budget and fund education, we had no ability

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[26] Hearing on A.J.R. 21 Before the Assembly Comm. on Taxation, 67th Leg. (Nev., May 4, 1993).

[27] As we noted in our prior opinion, the initiative measure included a provision that permits a majority of the Legislature to refer any proposed new or increased taxes for a vote at the next general election. The voter information, however, did not indicate that this language was included to resolve a budget impasse. Nor could this provision, Article 4, Section 18(3), realistically resolve a budget impasse. As the Legislature meets every other year in odd-numbered years for only 120 days, and general elections are held only every other year in even-numbered years, the voters could not intervene for sixteen months. *See* Nev. Const. art. 4, §§ 2(1), 2(2); NRS 293.12755.

to enforce the order. Under the separation of powers doctrine, individual legislators cannot, nor should they, be subject to fines or other penalties for voting in a particular way.[28] Additionally, we could not, nor did we, direct the Legislature to approve any particular funding amount or tax structure.[29] This does not mean, however, that no other remedy exists to resolve a constitutional crisis created by the Legislature's inability, as a whole, to fulfill its constitutional obligations. In this instance, the minority's refusal to accept the majority's duly passed budget decisions meant that the constitutional requirements to fund public education and balance the budget remained unfulfilled.

In his initial pleadings, the Governor cited to law in other jurisdictions with similar educational constitutional provisions. Courts of those states had assigned high priority to these provisions when their legislatures failed to fulfill their constitutional duties to fund public education. Some amicus briefs urged us to declare the two-thirds majority requirement unconstitutional, as it interfered with the Legislature's ability to fulfill its duty to fund education and balance the budget. At the very least, those amici urged the court to suspend operation of the two-thirds requirement in this session. Other amicus briefs argued against this proposition. Because the impasse was substantial, impairing educational functions, and because we discerned that the supermajority requirement was not created to avoid the Legislature's constitutional duties to fund public education and balance the budget, we considered these arguments.

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[28] *See Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 731, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980); *Gravel v. United States*, 408 U.S. 606, 616-18, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062 (11th Cir.1992).

[29] Annotation, Mandamus to Members or Officer of Legislature, 136 A.L.R. 677 (1942).

When a court is faced with conflicting policies arising out of multiple constitutional provisions in a specific factual situation, it must, if it can, strike a balance between the provisions. Conflict avoidance and resolution measures employed in First and Sixth Amendment jurisprudence demonstrate this fact. For instance, tension is continually present between the Establishment Clause and the Free Exercise Clause of the First Amendment.[30] One clause prohibits actions that might constitute the establishment of religion, while the other clause guarantees the right of all to be free to follow their religious preferences. Rather than rigidly enforce either provision, the United States Supreme Court has found in the constitutional machinery "play in the joints" in an effort to strike a balance between them.[31] This rejection of rigid constitutional doctrine is necessary to honor the "transcendent value of free religious exercise in our constitutional scheme," and extends, for example, "to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors."[32]

Similarly, where freedom of the press[33] may jeopardize a criminal defendant's right to a fair trial,[34] the High Court

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[30] *See Tilton v. Richardson*, 403 U.S. 672, 677, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (plurality opinion). A tension exists because, as Justice Brennan once noted, "There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the [Free Exercise Clause]." *Abington School Dist. v. Schempp*, 374 U.S. 203, 296, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring).

[31] *Norwood v. Harrison*, 413 U.S. 455, 469, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973); *Walz v. Tax Commission*, 397 U.S. 664, 669, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

[32] *Norwood*, 413 U.S. at 469, 93 S.Ct. 2804.

[33] U.S. Const. amend. I.

permits restrictions on trial publicity.[35] The Supreme Court has stated that "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information."[36]

In reconciling the competing provisions of Nevada's constitutional requirements to fund education and balance the budget with the supermajority requirements for changing the tax structure, we believed that the appropriate analysis required weighing the interests protected by each provision, under the specific facts of this case, to determine whether the net benefit that accrued to one of those interests exceeded the net harm done to the other.[37] The essential issue was whether the supermajority requirement could be improperly used by a few to challenge the majority's budget decisions, thereby preventing the Legislature from performing its other constitutional duties.

The primary interest supported by permitting the Legislature to suspend the supermajority requirement in this case was nothing less than the constitutional mandate to fund public education. The United States Supreme Court fifty years ago stated:

> [E]ducation is perhaps the most important function of state and local governments.... [Education] is the very foundation of good citizenship. Today it is a principal

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[34] Id. amend. VI.

[35] *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 562, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir.1950) (internal quotation marks omitted)).

[36] *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

[37] *See Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 559 (3d Cir.1984), *vacated on other grounds*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986).

> instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[38]

This statement is equally pertinent today. "No other governmental service plays such a seminal role in developing and maintaining a citizenry capable of furthering the economic, political, and social viability of the State."[39] Our State Constitution's framers explicitly and extensively addressed education,[40] believing strongly that each child should have the opportunity to receive a basic education.[41]

In addition, we were necessarily concerned with the interest of preserving the democratic process. A majority of legislators, representing a majority of the citizens of this state, make decisions on the services to be provided and the

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[38] *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

[39] *Claremont School Dist. v. Governor,* 142 N.H. 462, 703 A.2d 1353, 1356 (1997).

[40] *See* Nev. Const. art. 11, § 1 ("The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof."); *id.* art. 11, § 2 ("The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year ... and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools."); *id.* art. 11, § 6 ("In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund ....").

[41] *See Debates & Proceedings, supra* note 2, at 567-72.

future of the state. These include what programs to provide for children, the disabled and senior citizens; the construction and repair of roads and streets; funding of agencies to protect our citizens from telemarketing schemes or fraudulent transactions; costs associated with law enforcement activities; and staffing and location of state offices to avoid delays or long distance travel to obtain necessary documents such as drivers' licenses, vehicle or corporate registrations. Where these matters have been discussed and duly voted upon, the Constitution requires that the decision of the majority be respected.

Against public education, the democratic process and fiscal interests, we balanced the interests fostered by the supermajority requirement. The two-thirds requirement was intended, according to the information supplied to the voters in the 1994 and 1996 elections, to limit the influence of special interest groups, ensuring that one group would not control changes in the tax structure. The voter pamphlet also indicated that the amendment might promote more efficiency in government. These interests are legitimate and important, but they do not outweigh the need to fund education or abide by the majority rule mandated by Article 4, Section 18(1). To avoid an impasse harmful to public education, we determined that the supermajority provision could not be improperly used to avoid majority rule on budget appropriations. Accordingly, we held that the Legislature could suspend the supermajority rule in favor of a vote by a legislative majority, in this very narrow circumstance, in order to fulfill its obligations to fund education and balance the budget.

Resolution of the impasse was entirely in the hands of the Legislature. If the minority abided by the Constitution and recognized that majority rule controlled budget appropriations issues and thus the need to generate an amount of revenue, the impasse would end and the only issue remaining, what changes to make in the revenue structure to

achieve a balanced budget, would proceed by the two-thirds supermajority. This is, in fact, what happened. After our decision, the majority made concessions on the budget. Although some legislators would still have preferred additional cuts, they recognized that the Constitution required them to abide by the majority's decision and move on to determine how to balance the budget. Two-thirds of the members of both houses of the Legislature then approved the tax changes necessary to balance the budget. Our opinion did not eliminate the two-thirds requirement, but it did indicate that the supermajority provision could not be used to avoid other constitutional duties.

In the petition for rehearing, counter-petitioners take an abrupt about-face on interpreting the Nevada Constitution. For, although they strenuously argued in their counter-petition that the two-thirds supermajority provision necessarily predominated over the simple majority provision governing appropriations, and that the legislative appropriations made during the regular session were therefore void, they now argue, for the first time, that a construction permitting one provision to yield to another necessarily results in vote dilution. Yet counter-petitioners' proffered construction of the Constitution, if followed, would also result in vote dilution, according to counter-petitioners' own reasoning.

We do not reach these issues, however, because we determine that the petition for rehearing became moot when the Legislature passed the revenue-generating bills by the requisite two-thirds vote. We have consistently iterated that our duty "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare princi-

ples of law which cannot affect the matter in issue before [us]."[42]

In this case, once the Legislature adopted revenue-raising legislation by a two-thirds supermajority in order to fund the public school system and balance the state's budget, the rehearing petition became moot. And, although we recognize an exception to the mootness doctrine for issues capable of repetition yet evading review, the issues raised in the rehearing petition are not subject to this narrow exception.[43] As the United States Supreme Court has noted, to evade review, the challenged action must be too short in its duration to be fully litigated before its cessation or expiration.[44] If the Legislature were to increase or raise taxes in the future under simple majority rule, this court would have ample opportunity to review that action.[45]

The two-thirds supermajority provision, as passed, created the potential for an absolute budgetary stalemate in the Legislature; that potential was realized this year and has done significant damage to public education. A judicial resolution of the constitutional conflict was necessary, so that the Legislature could perform its constitutionally mandated du-

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[42] *NCAA v. University of Nevada*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981).

[43] See, e.g., *Langston v. Nevada*, 110 Nev. 342, 344, 871 P.2d 362, 363 (1994).

[44] *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975).

[45] We reject counter-petitioners' attempt to avoid the mootness bar under the exception that voluntary cessation of unconstitutional conduct will not prevent review. To the extent that counter-petitioners suggest that the Legislature's passage of revenue-raising legislation constitutes unconstitutional conduct, that suggestion is absurd. And to the extent counter-petitioners assert that the Legislature's voluntarily ceased "unconstitutional conduct" was passing revenue-raising legislation by a simple majority vote, there was no such conduct.

ties. Our prior opinion did just that. We dismiss the rehearing petition.[46]

/s Agosti, C.J.

/s Rose, J. /s Leavitt, J.

/s Becker, J. /s Gibbons, J.

SHEARING, J., concurring:

I would simply deny the petition for rehearing. Rule 40(c) of the Nevada Rules of Appellate Procedure sets forth the standards for the content of a petition for rehearing as follows:

> (1) Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing.
>
> (2) The court may consider rehearings in the following circumstances:
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> > (i) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
> >
> > (ii) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

This petition for rehearing is not appropriate under any of these provisions. The petition reargues matter previously considered and presents new matter not previously argued. Petitioners have not demonstrated to the court that the court has overlooked or misapprehended any material fact or material question of law. Neither have the petitioners demon-

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[46] We deny counter-petitioners' motion to vacate as well as their emergency stay motion.

strated that the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in this case. The petitioners are additionally requesting new relief. Since the petition for rehearing does not conform to the appropriate standards, it must be denied.

I do not agree that it is appropriate, in responding to a petition for rehearing, for this court to attempt to answer public criticism of this court's decision or to criticize the constitution or laws of this state. We must accept the duly enacted constitution and laws of this state, whether they are well advised or ill advised; the court's duty is to decide the cases brought before it. Often that duty involves trying to reconcile provisions that, in practical application, produce results that are incompatible with one another. The court has accomplished that reconciliation in this case. That should end the matter.

/s Shearing, J.

MAUPIN, J., dissenting:

The rehearing petition in this matter should be granted, the writ of mandamus dissolved and the prior majority opinion vacated. First the Nevada State Legislature completed its work without resort to the remedy afforded by this court in the writ. It ultimately complied with the Nevada Constitution as written by appropriating funds for the state educational system and creating the new revenue sources to pay for the appropriations by a two-thirds vote. [1] Second, the perceived

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[1] The Nevada State Constitution requires that the State Legislature appropriate sufficient funds to support and maintain the public school system; that it provide for sufficient revenues to balance the state budget; and that any increases in taxes to fund the state budget be approved by a supermajority of both houses of the legislature. *See* Nev. Const. art. 11, § 6; *id.* art. 9, § 2(1); *id.* art. 4, § 18(2). The writ, as noted by the majority on rehearing, allowed the 2003 Legislature, in special session, to create new funding sources by a simple majority rather than a supermajority to

crisis the majority sought to address in the writ was averted by the legislative action just mentioned. Third, the majority now indicates that the original decision had discrete application to the limited circumstances of the 2003 legislative sessions; thus a need for precedent for future sessions does not exist. Accordingly, the entire matter is moot.

I most strongly take issue with the court's comments on rehearing that the supermajority initiative was flawed from its inception and that the Nevada electorate twice approved it without an understanding that a stalemate between appropriations and taxes could eventuate. The initiative was vetted through two elections and we should not from this vantage point presume to say what the voters of this state knew or did not know. In any case, the potential for such a conflict was inherent in the proposal and the people of this state had every right to make it more onerous for the Legislature to create new revenue streams for the operation of government. Nothing in this constitutional construct prevents the Legislature from crafting a balanced budget and, as noted, the Legislature ultimately complied with the supermajority requirement.

We need look no further than the second paragraph of the Declaration of American Independence for sustenance in any judicial analysis of initiative petitions passed by a vote of the people:

> We hold these truths to be self-evident, ... [t]hat ... governments are instituted ..., deriving their just powers from the consent of the governed ....

This court did not invalidate the tax initiative as somehow being unconstitutional. Having thus affirmed its basic validity, we must recognize that such initiatives, however inconvenient to the operatives of government they may be at

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resolve an impasse in arriving at a balanced budget that existed as of July 10, 2003.

times, represent the ultimate form of citizen consent to government. Accordingly, it is not for us, the supreme court of this state, to criticize the wisdom of a valid initiative embraced by an overwhelming majority of Nevadans. I am therefore of the belief that we should, in response to the petition for rehearing, vacate the writ of mandamus and the prior opinion issued in aid of it.

/s Maupin, J.

Appendix C

IN THE SUPREME COURT
OF THE STATE OF NEVADA

THE HONORABLE KENNY C. GUINN,
Governor of the State of Nevada,

Petitioner,

v.

THE LEGISLATURE OF THE
STATE OF NEVADA, *et al.*,

Respondents.

LYNN HETTRICK, *et al.*,
Members of the Legislature of Nevada,

Counter-Petitioners,

v.

THE HONORABLE KENNY C. GUINN,
Governor of the State of Nevada, and the
LEGISLATURE OF THE STATE OF NEVADA,

Counter-Respondents.

PETITION FOR REHEARING

Respondents/counter-petitioners ask this Court to reconsider and clarify its decision in this case.[1] In particular, counter-petitioners request that the Court recall its writ of Mandamus directing the Legislature to proceed with the 20th

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[1] *Guinn v. Legislature of State of Nevada*, 2003 WL 21557517, 119 Nev. Adv. Op. No. 34 (July 10, 2003) [hereinafter Opinion].

Special Session "under simple majority rule." Instead, this Court should grant one of the alternative remedies suggested in the counter-petition, or at least require the Legislature to fund education first, to assure that education is immediately and adequately funded.

I. THE ARTIFICIAL AND AVOIDABLE "CRISIS"

This Court ruled that Article 4, Section 18(2) of the Nevada Constitution does not apply because of a perceived "crisis" regarding education funding. There is no irreconcilable crisis, however, because the current situation has been cynically manufactured by those wanting to force the highest tax increases.

As noted in the counter-petition, the crisis was caused by the Legislature's decision to fund non-educational state funding first, by a simple majority vote and then ending their regular session without providing *any* funding for K-12 education, in violation of the command of Art. 11, Sec. 6 of the Nevada Constitution. The educational crisis would never have existed if the Legislature had funded education first, as such a vote could clearly have achieved a two-thirds supermajority. Even the Governor concedes: "Any 'tension' [between constitutional provisions] has been created, not by the Constitution, but by the Legislature itself in the sequence in which it addressed the budget and revenue plan for the next biennium." (Governor's Supplemental Brief at 10).

The artificial crisis was caused when a majority of the Assembly chose to pass out AB553, the state operation funding bill, on June 2, 2003, before the K-12 school funding bill (Distributive School Account or "DSA"). The Assembly could have funded education first on June 2, 2003, but chose not to do so. That was the first move to put education funding in jeopardy.

Then, some legislators attempted to conjoin the DSA with the Assembly tax bill in the Ways and Means Commit-

tee. The Speaker stated unequivocally why the DSA and the tax bills were conjoined:

> Let me make it very, very perfectly clear why this particular motion is on the table. There is no secret about it. ***We are not going to give anybody an opportunity to vote for education and not the funding.*** That's in a nutshell what is going on here. There are a lot of folks who would take that option if it was given to them and the coward's way out is not going to be accepted. So that's why we are going to put this together; its going to take two-thirds and people are going to stand up and be counted or they are not.

(Ways and Means Committee Meeting, May 28, 2003, 72nd Legislative Session, emphasis added.)

The political nature of the conflict is apparent. Joining the DSA and the tax bill would force members of the Assembly either to vote for the state's largest tax increase or vote against education. This is a cynical manipulation of the legislative process—not any inherent "tension" between constitutional provisions—has put the education rights of Nevada children in jeopardy.

Let's Put Education First

To make matters worse, there is every reason to believe that this Court's opinion will encourage more harmful manipulation of the legislative process in future sessions. One senator has commented to the press, "In the future when we do taxes, and we don't do them very often, they will always be tied to the DSA because of this ruling."[2]

Therefore, this Court should rule that any perceived conflict between educational spending and Article 4, Section 18(2)'s two-thirds requirement is resolved by the Legislature passing funding for education before all other spending. The

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[2] As reported in the Las Vegas Sun on July 12, 2003.

solution imposed by this Court, setting aside the constitutional requirement of a two-thirds vote of each legislative house to raise taxes, was unnecessary to address the crisis. Moreover, it caused the Assembly to act in violation of the Nevada Constitution, violating federal constitutional rights to due Process, Equal Protections, and the guarantee of a republican form of government in the process.

II. THE LACK OF DUE PROCESS, THE VIOLATION OF JUDICIAL PROCEDURE AND THE SIMPLE UNFAIRNESS OF THE PROCESS

A. What Due Process Requires

Due process rights are guaranteed under the Fourteenth Amendment to the Unites States Constitutions. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"[3]

Correspondingly, it is a violation of due process rights to grant *sua sponte* relief without notice to the parties that such a result might be possible. An example of this principle is seen in Melendez Colon v. Rivera, where a bankruptcy court granted relief from a stay without informing the parties that it was considering the issue, even though the pleadings had framed the issue around asserted stay violations, rather than potential stay relief or modification.[4] Accordingly, the Bankruptcy Appellate Panel found the court's decision to be a

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[3] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)); *see also Golden v. Averill*, 101 P. 1021, 1027 (Nev. 1909) (recognizing that due process "requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights" and that "[a] hearing and an opportunity to be heard is absolutely essential").

[4] *Id.*

clear abuse of discretion.[5]

Cases have repeatedly recognized the need "to know the issues on which decision will turn and to be apprised of the factual material" so that a party may rebut claims against it.[6] Parties must know the claims and be given the opportunity to meet them.[7] While there are no hard, fast rules as to what violates these procedural due process rights, the United States Supreme Court has indicated that an "analysis of the governmental and private issues that are affected" is required.[8]

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[5] *Id.*

[6] *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937); *United States v Abilene*, 265 U.S. 274 (1924); *cf. Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531 (1864) ("Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense"); *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948) (due process requires that a person be given "reasonable notice of a charge against him, and an opportunity to be heard in his defense... to examine the witnesses against him, to offer testimony, and to be represented by counsel"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950) (notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *Armstrong v. Manzo*, 380 U.S. 545, 549-50, 85 S.Ct. 1187, 1190-91, 14 L.Ed.2d 62 (1965) (failure to notify petitioner of pendency of adoption proceedings deprived him of due process of law); *Goss v Lopez*, 419 U.S. 565, 579, 95 S.Ct 729, 738, 42 L.Ed.2d 725 (1975) ("students facing suspension ... must be given some kind of notice and afforded some kind of hearing"); *Lankford v Idaho*, 500 U.S. 110, 111 (1991) ("Held: The sentencing process in this case violated the Due Process Clause of the Fourteenth Amendment because at the time of the sentencing hearing, Lankford and his counsel did not have adequate notice that the judge might sentence him to death.").

[7] *Morgan v. United States*, 304 U.S. 1, 18 (1938).

[8] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

B. Due Process was Violated in this Case

This Court has violated due process rights, of the parties and of citizens in general, by reaching a matter not raised or briefed by the parties and on which no oral argument was conducted.

1. No Party Requested this Relief

No party ever asked for the remedy of setting aside the constitutional requirement of a two-thirds vote of each house to create or increase revenue. No party requested the court to invalidate Art. 4 § 18(2) or even to suspend its operation in this session.

The governor, who initiated this action on July 1, did not request such a remedy. He simply prayed for the court to direct the Legislature to appropriate funds "by a time certain" for a general state appropriations, previously passed by a simple majority, and for the DSA, which had not passed.

This remedy imposed by the Court directing that the Legislature could ignore the two-thirds vote requirement of the Nevada Constitution was simply not raised to allow notice and an opportunity to be heard. The dissenting justice makes clear that "none of the parties directly named in this litigation, including the Governor, have requested the specific relief we provide today." (Diss. At 1.)[9] The Governor, too,

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[9] Although an amicus brief of the NEA and other, filed the same day as the answers and this counter-petition, questioned whether this state constitutional provision should be applied, this did not properly present the issue. Evan assuming NEA had been granted leave to file its brief, amici cannot raise new issues on their own. The parties were not called on to brief the amici's points. Although the Court ordered the Governor and other counter-respondents to respond to the counter-petition filled the same day as the amicus brief, no response was ordered to any issues raised by the amici, despite inquiry from the undersigned counsel whether a response to the NEA brief would be requested.

admitted in the Federal District Court that he "never requested that the two-thirds legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken." The remedy was not raised by the parties.

2. The Court did not Order Briefing on the Issue

Later on July 1, when this Court ordered an answer and briefing, it did not order briefing on whether the two-thirds requirement conflicted with a requirement to fund schools. In that order, this Court did not even mention a supposed irreconcilable conflict between Art. 4 §18(2) and Art. 11, §6, the issue on which the Court would later decide this case. Indeed, the only "apparent conflict" noted in the order was between Art. 4 §18(1), the majority rule for most bills, and Art.4, §18(2), the two-thirds requirement for creating or increasing revenue. While the order requested the parties to address the "impact" of those provisions on the Legislature's ability to appropriate public school system funds, it did not suggest that it was considering invalidating or suspending the application of the constitutional two-thirds requirement.

3. The Court Denied Oral Argument

Counter-petitioners expressly requested oral argument "to assure that the issues involved in these petitions can be fully presented to this Court."[10] (Counter petition at 23.) In the past, when faced with an urgent constitutional issue which affected political issues, this Court has held oral argument and considered the positions of the parties before issuing a decision.[11] It did not do so here.[12]

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[10] Oral argument is allowable in writ petitions. NRAP Rule 21(b) provides that the Court "shall by order advise the parties of the dates on which brief are to be filed, if brief are required, and of the date of oral argument."

[11] *See e.g., Stumpf v Lau*, 108 Nev. 826, 839 P.2d 120 (1992) (the congressional terms limits case); *State Employees Ass'n, In.c. v. Lau*, 110

C. Refer to a District Court for Factual Determination

The Court's decision has apparently turned on matters occurring before the Legislature, the comparative advantages and disadvantages of certain political positions and the extent and effect of the so-called crisis. These matters are outside the proper record before this Court. Although the dissenting justice makes note of several "undisputed features" of the controversy, the facts relied upon by the majority are far from undisputed.

Consequently, this Court should remand or refer this case to the district court for the First Judicial District to make such a record, conduct an evidentiary hearing and factual determinations as necessary for this Court's resolution of this dispute. Such a hearing would consider, among other things, whether there are other options to meeting the constitutional mandate for education funding consistent with the structural provisions of the Nevada Constitution.

Nev. 802, 801 P.2d 1384 (1990) (the abortion ballot question). *See also, Nevada Judges Assoc. v. Lau*, 112 Nev. 51, 910 P.2d 898 (1996) (the judges' term limits case). The importance of fully examining the issue before interfering with the status quo is seen in *Stumpf v. Lau*, where this Court noted that the true nature of the constitutional question before it "began to unfold" and become clear only "[a]fter examining the written responses to the mandamus petition and listening to oral arguments of counsel..." *Id.* at 829, 839 P.2d at 122 (emphasis added).

[12] In contrast to this Court's procedure, the Federal District Court, which heard a related action to enjoin the legislature from passing tax increases by less than two-thirds, was unafraid to allow the parties to present the issues fully. After briefing, that court entertained argument for 90 minutes before all seven active District Judges sitting en banc. The Federal District Court then considered the arguments for two days before issuing its opinion.

III. WHY THIS DECISION IS SO WRONG

A. The Improper Constitutional Analysis Adopted by this Court

While this Court's result, alone, is certainly troublesome, the reasoning used to reach it also disregards established principles and establishes dangerous constitutional precedent far beyond the conflict here. This Court should reconsider its decision.

1. The Constitution Belongs to the People

While this Court finds that "constitutional construction is purely a province of the judiciary," citing *Marbury v. Madison*, it overlooks the points that *Marbury* was about the protection of written constitutions,[13] not the sublimation of constitutional rights to suit the Court's current need. While this Court certainly has the responsibility to interpret the constitution, the People decide what the Constitution says and they have done so unambiguously here: tax increases can only be imposed by a two-thirds vote in each house of the Legislature. The Court may not infringe on that.

Written constitutions, as *Marbury* states, are "the greatest improvement on political institutions,"[14] because the written constitution governs all. Because the constitution is written, it is permanent and cannot be changed easily. Laws will give way to the constitution; the constitution will stand.

The people decide what is important by putting it in the Constitution. The Court does not decide which of those rights are important and which are less so.

2. Difficulty is not an Excuse

This Court made note of whether the Legislature was "able to work" under Article 4, Section 18(2) and whether

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[13] *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

[14] *Id.*

constitutional provisions are "workable". The mere fact that constitutional protections make it more difficult for government officials to perform a certain act there is not reason for setting the constitutional provision aside. Courts must not sacrifice constitutional principle to their own assessment of administrative expediency.[15]

The people wanted it to be more difficult to change the status quo by raising taxes. While many officials and citizens may believe, politically, that the *status quo* should be changed,[16] the means to do so is a constitutional question, not a political one. This Court cannot reach.

3. No Hierarchy of Constitutional Rights

Rather than harmonizing the several constitutional provisions involved in this case, this Court assumed to "prioritize" the provisions, in effect giving the procedural safeguard of Article 4, 18(2) a lower priority in an apparent hierarchy of constitutional rights. There is no such hierarchy of constitutional rights and is improper for the Court to give greater priority to one provision over another. Indeed Courts have wisely rejected such an approach to constitutional jurisprudence.

For example, in *Nebraska Press Ass'n v. Stuart*[17] the United States Supreme Court, specifically refused to "prioritize" between the First Amendment freedom of expression and a criminal defendant's Sixth Amendment right to a fair trial. Declining to favor one amendment over another, the Court evaluated the extent to which the constitutional rights at stake would be served, concluding that a prior restraint on the press was inappropriate when there were other means

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[15] *Gibson v. H.S. Mason*, 5 Nev. 283 (1869).

[16] Compare the academic discussion in the dissent of the signal legislative issue with the approach taken in the majority opinion.

[17] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791 (1976).

available to the trial court to ensure a fair trail.[18] As the Court reasoned:

> The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances.[19]

Similarly, the Unites States Supreme Court has specifically rejected the proposition that there is a "hierarchy" among constitutional rights.[20] The Court firmly declared that there is no "principled basis on which to create a hierarchy of constitutional values."[21]

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[18] *Id.* at 569, 96 S.Ct. at 2807-08.

[19] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561, Ct. 2791, 2803-04.

[20] *Id.*, at 484, 102 S.Ct., at 765. *See also, e.g., Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 628, 109 S.Ct. 2646, 2654 (1989) ("While petitioner and its supporting amici attempt to distinguish between the expenditure of forfeitable assets to exercise one's Sixth Amendment rights, and expenditures in the pursuit of other constitutionally protected freedoms, there is no such distinction between, or hierarchy among, constitutional rights.") (citations omitted); *Bolick v. Roberts*, 199 F.Supp.2d 397, 434 (E.D. Va. 2002) ("This Court chooses to abide by the rule of constitutional law that holds that 'there is no principled basis on which to create a hierarchy of constitutional values.'").

[21] *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

4. No Minor "Procedural" Right

This Court provides no authority for its dispositive proposition that constitutional rights that are procedural in nature must give way to constitutional rights that are "substantive" in nature. This subordination of so-called "procedural provisions" to "substantive rights" is anathema to constitutional principles.

At the very least, by dismissing Article 4, § 18(2) as a mere "procedural requirement," this Court overlooks the substantive rights underlying and protected by this procedural guarantee, a key structural provision of the current Nevada Constitution. Other provisions, which could be construed as similarly procedural, are put at risk by this Court's decision. The guarantee of "due process," for example, is oft considered a "procedural" right and, under the Court's approach, could be held give way to other rights. Other rights, too, may be held to be such substandard procedural rights, such as the right to trial by jury. This Court's decision in this case is no different from holding that the structural requirements of bicameralism and presentment are merely general procedural requirements that may be case aside when they become inconvenient.[22] The Court's ruling is both contrary to reason and unsupported by authority.

Undeniably, the right to due process, although it guarantees certain *procedural* rights be afforded prior to the taking of property, is itself a constitutional right.[23] Accordingly, where as here the taking of property through taxation, is at

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[22] *I.N.S. v Chadha*, 462 U.S. 919 (1983).

[23] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493 (1985) ("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.").

issue the dismissal of certain guarantees as "merely procedural" ignores the underlying right.

Clearly the voters of Nevada, in voting for an amendment to the constitution did not envision that they were voting for a mere procedural requirement that could be set aside whenever it became administratively inconvenient. Rather, like the enactment of certain individual rights themselves, the amendment was intended to "ensure that certain principles will not be sacrificed to expediency."[24] The only difference is that they place tax increases "beyond the reach of governmental officials or legislative majorities"[25] not by prohibiting them outright but by ensuring that they be enacted by a two-thirds vote of the legislature or by a vote of the people themselves.

B. The Specific Two-Thirds Requirement for Increasing Taxes Takes Precedence Over the Generalized Requirement that the Legislature Provide Additional Funding for Schools

This Court did not even follow its own rules of statutory

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[24] *Hudson v. Palmer*, 468 U.S. 517, 556-57, 104 S.Ct. 3194k 3216-17 (1984) ("More fundamentally, in its eagerness to adopt a rule consistent with what it believes to be wise penal administration, the Court overlooks the purpose of a written Constitution and its Bill of Rights. That purpose, of course, is to ensure that certain principles will not be sacrificed to expediency; these are enshrined as principles of fundamental law beyond the reach of governmental officials or legislative majorities.").

See generally West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects form the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Ones' right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.")

[25] *Id.*, 319 U.S. at 638, 63 S.Ct. at 1185, 87 L.Ed. at 1628.

construction. This Court created a conflict in constitutional provisions that did not exist,[26] in contravention of its own precedent to reconcile conflicting provisions.[27] It misapplied its own precedent on the interpretive canon that specific provisions take precedence over general provisions, which applies for statutes or provisions related to the same subject matter, not, as here, different subjects.[28] This Court treated the specific two-thirds vote as a general requirement, and the general provision that the legislature provide education funding as a specific requirement, giving preference to the latter in violation of its canon to give effect to specific provisions over more general ones.[29] Finally, this Court ignored the long-established doctrine that in interpreting statues or constitutional provisions of equal weight, the last in time prevails over earlier provisions.[30]

C. An Appropriate Balance: *Let's Put Education First*

As noted above, the present tension between the funding

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[26] The only funding for education mandated by the Nevada Constitution is that "a school shall be established and maintained in each school district at least six months in every year." Nev. Const. art. XI, § 2. Even if this is violated, the Constitution itself specifies a remedy—that the district "may be deprived of its proportion of the interest of the public school fund during such neglect or infraction." *Id.* in other words, the Nevada Constitution itself suggests that the clause is not binding on the State Legislature. Moreover, there were several options to fund education available to the Court that would not have posed any conflict with the two-thirds requirement, as noted by the Governor himself. See Petition for Writ of Mandamus at 10.

[27] *State Div. of Ins. V. State Farm Mut. Auto Ins. Co.*, 995 P.2d 482, 486 (Nev. 2000); *Bowyer v. Taack*, 817 P.2d 1176, 1177 (Nev. 1991).

[28] *Western Realty Co. v. City of Reno*, 172 P.2d 158 (Nev. 1946); *Wainwright v. Bartless*, 271 P. 689 (Nev. 1928).

[29] *See Gaines v State*, 998 P.2d 166 (Nev. 2000); *Hardison v. State*, 763 P.2d 52, 55 (Nev. 1988).

[30] *Nevada Power Co. v. Haggerty*, 989 P.2d 870, 877 (1999).

of education and the two-thirds voting requirement is a product of the order in which the Legislature chose to make appropriations. Had the Legislature passed funding first, rather than after the general appropriation bill, then there would be no educational crisis. To avoid this problem in the future, education must be funded first. The Court must clarify that this is a requirement. Otherwise, future legislative sessions threaten to repeat the crisis artificially generated in this case.[31]

IV. STANDARD OF REVIEW FOR PETITION FOR REHEARING

Pursuant to NRAP Rule 40(c)(2), this Court may consider rehearings in the following circumstances:

(i) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or

(ii) When the court has overlooked, misapplied or failed to consider a statue, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

At least one commentator has said that appellate courts that decide a case *sua sponte* without hearing from the parties should grant the losing party's request for rehearing as a matter of right.[32]

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[31] Counter-petitioners note that comments of Assemblyman Dina Titus after this Court issued its opinion, as reported in the Las Vegas Sun on July 12, 2003: "In the future when we do taxes, and we don't do them very often, they will always be tied to the DSA (Distributive School Account, which funds K-12 education) because of this ruling."

[32] Adam A. Milani and Michael R. Smith, "Playing God: A Critical Look At Sua Sponte Decisions By Appellate Courts," 69 Tenn. L. Rev. 245, 305-6. As reasoned therein:

> If, despite the concerns raised above, an appellate court decides a case on an issue raised sua sponte without input from the parties, it should grant motions for rehearing filed by the losing

It is ordinarily inappropriate to bring up matters that were not previously raised by the parties in their briefs or at oral argument. In this case, however, the Court imposed a remedy—setting aside the two-thirds requirement—that was neither requested by the Governor, nor raised by any of the other parties. Counter-petitioners were not allowed oral argument or the opportunity to be heard on the issues. Under the circumstances, rehearing should be granted so that counter-petitioners may address the propriety of the remedy imposed by the Court.

V. THE OTHER FEDERAL ISSUES CREATED BY THIS COURT'S *SUA SPONTE* REMEDY

As a result of this Court's decision on the two-thirds requirement, counter-petitioners and their fellow citizens suffered harm when exercising rights protected by the Federal Constitution. Most specifically and acutely, the Assembly counter-petitioners have had their legislative vote diluted, in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment.

Individual Nevada voters, too, some residing in the districts of the Assembly counter-petitioners, have had their right to undiluted representation infringed, in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment. Even those citizens, who voted in 1994 and 1996 for the initiative which added Article 4, § 18(2) to

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party as matter of right. A rehearing would vacate the first decision, and give the parties an opportunity to be heard on the issued decided sua sponte. This procedure would satisfy concerns about due process and the adversary system, and would render moot the abuse of discretion claim. Moreover, this is precisely the type of situation for which the rehearing process was created. If a court fails to grant a rehearing in these situations, the end result is a violation of due process because there was no opportunity to be heard before or after judgment.

the Nevada Constitution, have had their constitutionally-protected right to vote (and to have their votes counted and given effect) infringed, in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment and the Republican Guarantee Clause of Article IV. Allowing the Legislature to create and increase taxes without the constitutionally required two-thirds vote will take citizens' property without due process of law, in violation of the Due Process clauses of the Fourteenth Amendment.

A. Dilution of Legislators' Voting Rights

1. Violation of the Legislators' Rights

A state legislator has a federal right not to have his vote diluted or rendered nugatory by actions of the Legislature. The United States Supreme Court explained that such legislators "have a plain, direct, and adequate interest in maintaining the effectiveness of their votes."[33] Other courts, including the Ninth Circuit, have recognized that a state legislature's failure to comply with its own procedures may violate due process.[34] "Fairness (or due process) in legislation is satisfied when the legislation is enacted in accordance with the procedures established in the state constitution and statutes for the enactment of legislation."[35]

In *Bender v. Willamsport Area School District*, the United States Supreme Court expressly suggested, albeit in *dicta*, that members of the state legislative bodies have standing to bring a vote dilution claim that arises from viola-

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[33] *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (involving a federal constitutional amendment.)

[34] *See e.g. Rea v. Matteucci*, 121 F.3d 485, 485 (9th Cir. 1997) (quoting *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *Conway v. Searles*, 954 F. Supp. 756, 767 (D. Vt. 1997).

[35] *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991).

tions of state law.[36] A legislator in such circumstances "would have to allege that his vote was diluted or rendered nugatory under state law," and "he would have a mandamus or like remedy against the Secretary of the School Board."[37]

The hypothetical case described in *Bender* is nearly identical to the present case. Article 4, § 18(2) of the Nevada Constitution authorizes legislative action on tax increases "solely" by two-thirds vote. Legislators, who together provided enough votes to defeat any proposed tax increase pursuant to the two-thirds vote requirement of Article 4 are legally entitled to preservation of the effectiveness of their vote. Under the Nevada Constitution, a State Assembly member's vote is 1/15 of the votes necessary to defeat a tax increase. Under the procedure authorize in this Court's opinion, an Assembly member's vote is only 1/21 of the votes necessary to defeat a tax increase—a quite perfect example of vote dilution in violation of the Due Process clause.

2. Violation of the Voters' Derivative Rights

The United States Supreme Court has repeatedly recognized the rights of electors, too, not to have their votes diluted.[38] It is immaterial that dilution occurs after the voters' representative is elected, and is therefore derivative of the legislator's vote dilution claim.[39] As the D.C. Circuit aptly noted in *Michel*, "It could not be argued seriously that voters

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[36] *Bender v. Willamsport Area School District*, 475 U.S. 534, 544 note 7 (1986) ('If... state law authorized School Board action solely by unanimous consent," a disenfranchised school board member "might claim that he was legally entitled to protect "the effectiveness of [his] vot[e]'") (quoting *Coleman*, 307 U.S. at 439.) (brackets in original).

[37] *Id.*

[38] *See Westberry v. Sanders*, 376 U.S. 1 (1964); *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

[39] *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994); *see also Skaggs*, 110 F.3d at 834.

would not have an injury if their congressman was not permitted to vote at all on the House floor."[40] Depriving the voters' elected officials the full weight of the officials' votes is only a difference in degree from the hypothetical embraced by the D.C. Circuit as a self-evident constitutional violation.

"The right of suffrage is 'a fundamental political right, because [it is] preservative of all rights.'"[41] When this Court decided that the Legislature need not abide by Article 4, § 18(2) of the Nevada Constitution, it diluted the representation to which the legislators' constituents are entitled, and, by doing so, diluted the constituents' right to vote. Infringement on the right to vote, including infringement by dilution, violates the First and Fourteenth Amendments of the U.S. Constitution.[42]

B. Violation of Voters' Rights in Adopting the Two-Thirds Rule

The right to vote constitutes more than just the right to show up at a voting booth and cast a meaningless vote. It includes the right to have that vote counted and, if successful, to have the results of the vote given effect.[43]

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[40] 14 F.3d at 626.

[41] *Roe v. State of Ala. By and Through Evans*, 43 F.3d 574, 580 (11thCir. 1995) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

[42] *Id.*

> [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' ...If, however, 'the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order.

Id. (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)).

[43] *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *United States v. Mosley*, 238 U.S. 383, 386 (1915).

This Court's decision nullifies the people's initiative vote in 1994 and 1996 to incorporate Article 4, § 18(2) into the Constitution, at lest whenever there is a budget stand-off involving spending for education. In doing so, the Court deprived the people of their right to an effective vote, protected by the Fourteenth Amendment of the U.S. Constitution. In addition, this Court's remedy will give greater—indeed dispositive—weight to the minority of votes cast against adopting Article 4, § 18(2) such a result violates the Equal Protection Clause of the Fourteenth Amendment.[44] The right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote as effectively as wholly prohibiting the free exercise of the franchise.[45] "[T]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."[46]

C. Violation of the Republican Guarantee Clause

Article IV, section 4 of the United States Constitution provides that "The United States shall guarantee to every State in the Union a Republican Form of Government..." Although claims premised on the Republican Guarantee Clause have long been viewed as nonjusticiable political questions in most circumstances,[47] Justice O'Connor noted for the Court in *New York v. United States* "that perhaps not

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[44] *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another") (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)).

[45] *Id.* at 105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

[46] *Id.* at 107 (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)). The fact that the Nevada Supreme Court ratified this debasement of the initiative voters is of no moment. *See Bush*, 531 U.S. at 107 (finding an equal protection violation by disparate recount procedures that were "ratified" by the Florida Supreme Court).

[47] *See Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849)

all claims under the Guarantee Clause present nonjusticiable political questions."[48] "Contemporary commentators," she noted, "have likewise suggested that courts should address the merits of such claims, at least in some circumstances."[49] Several courts have acknowledged that the Republican Guarantee Clause might present justiciable questions in the wake of *New York v. United States*, but found that the Clause had not been violated in the particular circumstances at issue in the cases.[50]

This case presents one of the rare instances in which a Republican Guarantee claim is viable. The essence of the claim, drawn from *New York v. United States*, is whether a state's citizens may "structure their government as they see fit."[51] Actions that have a "realistic risk of altering the state's form of government" from what the citizens of the state have themselves adopted have been held to be amenable to Republican Guarantee Clause claims.[52] While in *New York v. United States,* itself, the United States Supreme Court dis-

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[48] 505 U.S. 144, 183 (1992).

[49] *Id.* at 185 (citing L. Tribe, *American Constitutional Law* 398 (2d ed. 1933); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 118, 122-23 (1980); W. Wiecek, *The Guarantee Clause of the U.S. Constitution* 287-89, 300 (1972); D. Merritt, 88 COLUM. L. REV. 1, 70-78 (Jan. 1988); Bonfield, *The Guarantee clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560-65 (1962)).

[50] *See Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Adams v. Clinton*, 90 F.Supp. 2d 35 (D.D.C. 2000); *New Jersey v. United States*, 91 F.3d 463, 468-69 (3rd Cir. 1996); *Padavan v. United States*, 82 F.3d 23, 27-28 (2nd Cir. 1996); *Deer Park Ind. Sch. Dist. v. Harris Cty. Appraisal Dist.*, 132 F.3d 1095, 1099-1100 (5th Cir. 1998); *City of New York v. United States*, 179 F.3d 29 (2nd Cir. 1999); *Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995); *but see State ex. rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Or. 1997) (holding that Republican Guarantee claim is nonjusticiable).

[51] *Kelly*, 69 F.3d at 1511.

[52] *Texas*, 106 F.3d at 667; *New Jersey*, 91 F.3d at 468-69.

missed the Guarantee Clause claim because the statute in that case did not "pose any realistic risk of altering the form or the method of functioning of New York's government,"[53] this Court's ruling does pose such a risk of altering the state's form of government by altering the people's adoption of a constitutional two-thirds vote requirement for tax increases. The Federal Constitution protects the structural preferences of a state's citizens, serving as sort of a "structural referee."[54]

To avoid crating this conflict and infringing on the rights of Nevada citizens to determine their own constitution and their own form of government, this Court should not impose a remedy that debases the "structural" preferences of Nevada's citizens and invites such federal intervention.

D. Violation of Taxpayers' Due Process Rights

This Court's decision allows that taxpayers will have their property taken without due process of law. "To be deprived of liberty or property without due process of law means to be deprived of liberty or property without authority of the law."[55] "[T]he government operates with greater fairness, and thus greater legitimacy, when it does not change the rules midway through the game."[56]

The constitutional argument is simple and clear. Since 1996, the Nevada Constitution has specified the process by which new taxes can be imposed or existing taxes can be raised: a two-third vote of the members of each house of the

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[53] 505 U.S. at 186.

[54] *Brozonkala v. Virginia Polytechnic Inst. and State Univ.*,169 F.3d 820, 895 (4th Cir. 1999), *aff'd sub nom United States v. Morrison*, 529 U.S. 598 (2000).

[55] *Rosaly v. Ignacio*, 593 F.2d 145, 150 (7th Cir. 1979).

[56] *Chambers v. Reno*, 307 F.3d 284, 296 (4th Cir. 2002).

Legislature is required.[57] This Court's decision, allowing tax increases with fewer votes, amount to the taking of the property of Nevada citizens and businesses without the process that was due.

E. Violation of the rights of the Legislature

Finally, the recent action of the Nevada Assembly, treating bills increasing taxes as "passed" by a mere majority vote rather than the 2/3 vote required by Article 4, § 18(2) of the Nevada Constitution, amounts to a violation by the legislature of Due Process rights guaranteed both to the respondent/ counter-claimants and the voters they represent. State legislators take an oath to support the constitution – both that of Nevada and that of the United States – that is independent of any "permission" which the courts of their state may give them to violate those constitutions.[58] The *sua sponte* decision of this Court, granting a remedy that no party requested, based on supposed conflict between constitutional provisions that simply did not exist, simply cannot provide the legislature with the fig leaf they would like to cover their unconstitutional actions in blatant disregard of the clear command of the Nevada constitution.

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[57] NEV. CONST. ART. 4, §18(2).

[58] *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958); ("[n]o state legislator or executive or judicial office can [wage]war against the Constitution without violating his undertaking to support it"); *cf. Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987) ("Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it").

DATED this 21st Day of July 2003.

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